

**QUARTERLY REPORT**  
**of the**  
**ATTORNEY GENERAL**  
**of**  
**ALABAMA**

**For the Period:**  
**From October 1, 1938**  
**Through December 31, 1938**  
**Volume XIII**

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**TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:**

In accordance with an Act of the Legislature of Alabama found on page 1114 of the General Acts of Alabama, Regular Session, 1935, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from October 1, 1938 through December 31, 1938.

The Act referred to above requires that six copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, and the County Superintendent of Education.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully ,  
A. A. CARMICHAEL,  
Attorney General.

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**1938**

# OPINIONS



October 1, 1938.

Hon. T. C. Garner,  
Treasurer, Jefferson County,  
Birmingham, Alabama.

County Treasurer—

1. Treasurer of Jefferson County is liable for the payment of a claim, even though the claim has been examined and allowed against the county by the County Commissioners, duly recorded in their minutes, and a voucher for same has been issued upon their authorization and signed by the Chairman or the President Pro Tem of the Commission, if the invalidity of said claim appears upon its face, or upon the face of the records of the Court of County Commissioners, or the Treasurer has actual knowledge of its invalidity.

2. In such a case, the Treasurer of Jefferson County is not liable for the payment of such a claim, if the invalidity of same does not appear upon its face, or upon the face of the records of the Court of County Commissioners, or he does not have actual knowledge of its invalidity.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of recent date as follows:

“Does any financial responsibility rest upon me as Treasurer of Jefferson County in an instance where a claim is examined and allowed against the county by the County Commissioners, duly recorded in their minutes, a voucher issued upon their authorization and the voucher signed by the chairman or the President Pro Tem of the commission if the claim allowed was subsequently determined to be of an illegal nature?”

712 533  
In the case of In re: Opinion of Justices, In re: County Officers, 143 So. 345, the Supreme Court of Alabama held that the Treasurer of Jefferson County was a County officer.

Section 303 of the Code of Alabama of 1923 sets forth the duties of a County Treasurer. Section 303 of the Code of Alabama reads in part as follows:

“It is the duty of the County Treasurer—

1. To keep the money of the County and disburse the same as below stated. \* \* \* 4. To number and register, in the order in which they are presented, all claims against the general fund which have been audited and allowed by the court of county commissioners as claims against such fund \* \* \* 15. To perform such other duties as are or may be by law required of him.”

Section 224 of the Code of Alabama provides that the Court of County Commissioners must, in term time, audit all claims against their respective counties; and every claim, or such part thereof, as is allowed must be registered in a book kept for that purpose - - etc.,

Section 6755 of the Code of Alabama as amended by the Acts of 1931, page 759, and the Acts of 1933, page 201, sets forth the authority of the Court of County Commissioners.

Section 4 of the Act of 1933 reads as follows:

"4. To examine, settle, and allow all accounts and claims chargeable against the county."

Section 10265 of the Code of Alabama of 1923 provides as follows:

"10265. Against county treasurer and sureties for failure to pay allowed claims; court and notice.—If any county treasurer fail on demand, and without good excuse, to pay an allowed claim against the county, when there are funds in the treasury to pay the same, judgment may be obtained against him and his sureties, or any or either of them, on five days' notice, on motion in the circuit court of the county, in the name of the party to whom the claim is payable, his legal representatives, or assigns, for the amount of the claim, with interest from the time of the demand, and ten per cent damages and costs."

In the case of **Ramage, Parks & Co. v. Folmar, County Treasurer**, 121 So. 504, the Supreme Court of Alabama on page 507 says:

"(2) There must be express warrant of law for all collections and disbursements of the public moneys, and claims not so authorized are null and void. \* \* \*

"(3,4) The existence of a warrant in due form, if issued with authority and duly presented, makes a prima facie case for movants; if without authority of law, it is void."

In the case of **Mobile County v. Williams**, Judge, 180 Ala. 639, the Supreme Court of Alabama, on page 647, says:

"The law in this State is well settled that the court of county commissioners of a county, in auditing and allowing claims against the county, acts in an administrative capacity only, and that the allowance of a claim by such court is prima facie evidence only of its correctness. 'When a claim is allowed which is not legally and properly chargeable against the county, the commissioners' court exceeds its authority, and the allowance of the claim is void, and the county is not estopped from disputing its liability.' *Commissioners Court vs. Moore*, 53 Ala. 25. In such a case, 'if the funds are in the treasury of the county to pay the same, and the county treasurer should be proceeded against for a failure to pay on demand, it would be his duty to set up in defense the invalidity of the claim' \* \* \* 'if the record should show affirmatively that the court has allowed a claim not legally chargeable on the county, the allowance of which' is in 'excess of the authority with which the court

is entrusted the allowance would be void.' It is only 'when the claim is of the character with which the county is by law chargeable' that a prima facie liability can be created by the order of the court of county commissioners' \* \* \* .

"When, therefore, there are, either upon the face of the claim, or upon the face of the records of the court of county commissioners, or otherwise, evidences brought home to the county treasurer that a claim, although allowed by the court of county commissioners, is in fact invalid, then it is the duty of such treasurer to refuse to pay such claim and to present, on behalf of the county, the defense of such county to such claim. If he pays such a claim he does so at his peril."

In the case of *Marengo County v. Barley*, 96 So. 753, the court on page 755 says:

"The approval of the claim by the county authorities charged with such duty can only be justified or sustained for its true amount, and was void as to the excess challenged in the instant suit."

In the case of *Jeffersonian Pub. Co. v. Hilliard*, 105 Ala. 576, the head-notes read as follows:

"1. Claims against county; when allowed by commissioners' court, probate just must issue warrants on county treasury.—The issuance of warrants on the county treasury in payment of claims that have been audited and allowed by the court of county commissioners, is a ministerial duty imposed on the probate judge (Code, 901), in the performance of which he is without discretion, unless the order of allowance is itself an absolute nullity and void on its face; and if the judge of probate refuse to issue a warrant on the county treasury in obedience to an order of allowance, which is valid on its face, his obedience thereto may be compelled by mandamus.

"2. Same; same; interest of commissioners in claim presented does not render order of allowance void.—The fact that the three county commissioners who voted the audit and allowance of a claim against the county, are interested in the claim, does not render the order of allowance of such claim void; and the probate judge cannot justify his refusal to issue a warrant on the county treasury in payment of said claim on the ground of said commissioners' interest therein.

"3. Same; same; allowance of claim bars further proceeding in pending suit on such claim.—The allowance by the court of county commissioners of a claim against the county which had been formerly disallowed and upon which a suit is pending, bars further proceedings in such suit; and the pendency thereof furnishes no excuse for the refusal of the probate judge to issue a warrant against the county treasury in payment of such claim after it has been audited and allowed."

In response to your inquiry it is my opinion that you are a county officer and that if, upon the face of the claim, or upon the face of the records of the court of county commissioners, or otherwise, any evidence is brought home to you as such treasurer, that a claim, though allowed by the court

of county commissioners, is in fact invalid,—that is, based on a void or illegal contract or anything that would make the claim a void claim, or an invalid claim that if you pay such claim you would do so at your peril. See the case of *Mobile County v. Williams*, supra.

However, if the claim is of the character of which the county is by law chargeable, then the audit and allowance creates a prima facie liability on the county, and unless the order of allowance of the claim is void and shows on its face that the allowance of the claim is invalid, and you have no notice of the invalidity of the claim, then it is my opinion that there would be no liability on your part in the payment of the claim. See *Jeffersonian Pub. Co. v. Hilliard*.

Compare opinion of the Attorney General to Mrs. Gertrude P. Calloway, Treasurer of Chilton County, Clanton, Alabama, under date of January 9, 1936, Quarterly Report of the Attorney General, Volume II, page 11.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

October 3, 1938.

Hon. Wm. F. Black, Chief,  
Bureau of Transportation,  
Alabama Public Service Commission,  
Montgomery, Alabama.

Public Service Commission—Motor Carriers—

Suggested general order fulfills requirements of Alabama Motor Carrier Act of 1931.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"The provisions of Alabama Motor Carrier Act of 1931 (General Acts of Alabama, 1931, page 303) make it unlawful for any motor transportation company as defined in Section 1 thereof to operate or furnish service within this State without first having obtained from the Public Service Commission a certificate declaring that public convenience and necessity will be promoted by such operation.

"Briefly stated, the following procedure is required of motor carriers engaged in the transportation of persons or property in interstate commerce over the highways of the State of Alabama: Application must



be filed in accordance with the provisions of Section 4 of the Act referred to and the same is assigned for hearing, notice being given to statutory interested parties as named in Section 4. Twenty days notice of the hearing is given in each instance. At the hearing the applicant is not put to prove that public convenience and necessity require the proposed operation but must satisfy the Commission that it has met, or is willing to meet, those requirements of Alabama Motor Carrier Act of 1931 that are properly applicable to an interstate carrier. The applicant must file a mileage tax bond to secure the payment of mileage taxes prescribed by Section 5 of the Act.

"He must file a public liability and property damage insurance policy. The applicant must express a willingness to keep such records and file such reports as will permit the State of Alabama properly to enforce its police regulations and collect its mileage tax. In addition the fee prescribed by Section 5 of the Act is collected from such applicant. When all of these requirements have been met, and the Commission finds no good reason in the exercise of the State's police power to deny the application, an order of approval of the proposed operation is entered. This authority is not designated a certificate of public convenience and necessity for the reason that such a designation might be confusing. For convenience we refer to these orders as 'Interstate Approvals'.

"As has been said in the foregoing statement of the practice of the Commission, a purely interstate motor carrier is required to file an application with the Commission and have the same assigned for hearing in accordance with the provisions of Section 4 of Alabama Motor Carrier Act of 1931. It appears the matters to be determined at the formal hearing under ordinary circumstances and conditions may be just as easily determined without a formal hearing. It has occurred to the writer that because of the nature of proceedings involving applications such as those here under discussion, and the narrow scope of the inquiry at such hearing, the Commission might proceed in these matters substantially as set forth in the following paragraph, which, for convenience, is stated in the form of a suggested general order:

"A motor transportation company proposing to engage in the transportation of persons or property over the highways of Alabama in interstate commerce only must apply to the Commission for its approval of the proposed operations furnishing such information as the Commission may require application form to call for such information as will permit the State to administer the provisions of law and the rules and regulations of this Commission as are properly applicable to the applicant. Upon receipt of such application the Commission will notify in writing statutory interested parties referred to in Section 4 (a) of Alabama Motor Carrier Act of 1931 of the filing thereof and, if no request for a hearing upon the application is received within 10 days after the service of such notice, the Commission will proceed to consider such application informally.

"The foregoing would still permit the Commission to assign such an application for hearing if a valid request therefor was received. It would also permit the Commission if the circumstances justified to require the matter to be assigned for hearing on its own motion. It appears, certainly in a case of this character, that an opportunity to be heard is the legal equivalent of a hearing.

"I will appreciate your opinion as to whether or not the suggested general order will meet the requirements of our statute."

As you state, in 1935, the Congress of the United States entered the field of motor carrier regulation and the authority to regulate motor carriers engaged in interstate commerce was vested in the Interstate Commerce Commission, 49 U. S. C. A. Section 301 et seq. However, it has been held that although a carrier may be engaged purely in interstate commerce yet the state has some rights to regulate the conduct of the motor carrier in passing through the state itself. *L & L Freight Lines, Inc. v. Douglas*, 169 So. 501.

Further, Section 36 of the Alabama Motor Carrier Act of 1931 (General Acts, 1931, p. 319) provides as follows:

"Section 36. A substantial compliance by the Commission with the requirements of this Act shall be sufficient to give effect to all rules, orders, acts and regulations of the Commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature, in respect thereto."

I agree with you that an opportunity to be heard is the legal equivalent of a hearing. It is my conclusion, therefore, that the suggested general order in reference to motor carriers engaged in interstate commerce only, will meet the requirements of the Alabama Motor Carrier Act of 1931 in order to regulate the passing of the carrier through this state.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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October 3, 1938.

Hon. J. H. Sims,  
Judge of Probate,  
Bullock County,  
Union Springs, Alabama.

1. Public Officers—Assignments—

Fees and compensation of public officers held subject to assignment subsequent to date same were earned and payable. Attempted assignment of unearned fees and compensation of public officers held to be against public policy and void.

2. Bonding company who paid extent of bond held subrogated to rights of State.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter under date of April 22, 1938, in which you request my opinion as follows:

"I wish your opinion on the following:

"This office has on file a claim of W. E. McNair for Ex-Officio Fees in the amount of \$200.00 and County Court Fees in the amount of \$75.00. Judge McNair assigned the above Fees to the First National Bank of Union Springs, Alabama, for which he received value.

"Judge McNair died on June 12 and his accounts were audited and a charge of some \$376 was made against him in the County General Fund.

"Later his administratrix filed a claim for the above mentioned fees in the amount of \$275.00.

"To whom should the Ex-Officio Probate Court Fees and County Court Fees due Probate Judge W. E. McNair, Deceased, be paid?"

You state in your letter that your office has on file a claim of W. E. McNair, deceased, Ex-Probate Judge, for ex-officio fees in the amount of \$200.00 and a claim for county court fees of \$75.00. You further state that Judge McNair assigned to the First National Bank of Union Springs, Alabama, the ex-officio fees in the amount of \$200.00 and the county court fees in the amount of \$75.00. For your information, I have considered the question of the assignment first and must necessarily decide here whether or not such assignment was valid at the time it was made. The answer to this question must turn upon whether or not the fees under consideration were earned at the time the assignment was made. In my judgment, the county court fees were earned at the time the services were rendered, and if the assignment was made subsequent to the time these services were rendered the assignment, insofar as the \$75.00 is concerned, is valid. Concerning the \$200.00 ex-officio fees, it is my opinion that these fees do not constitute a debt of the county or a claim payable by the county until the same have been audited and allowed, and are therefore not subject to assignment unless the said assignment was made subsequent to the date of the auditing and allowance of the same by the governing body of the county. I wish to refer you to the case of *Schloss v. Hewlett*, 81 Ala. 266, in which the court held as follows:

"The law is well settled, that while a public officer may, unless specifically prohibited, assign and transfer his claim for compensation on account of past services rendered, an assignment of his claim to compensation for future or continuing services is contrary to public policy and void."

See also *Ex Parte Stewart*, 185 Ala. 216, and 5 Corpus Juris, 873, and authorities cited therein.

You further state in your letter that an audit of the books and accounts of Judge McNair shows the sum of \$376.00 due to the county. In my judgment, the county has a lien against Judge McNair's estate for this sum, and no money due to Judge McNair or his assignees should be paid until this lien is satisfied.

I wish to refer you to Section 2603 of the Code of 1923 which provides as follows:

"2603. Bond a lien.—The bond of the judge of the probate court, of the county clerk, of the sheriff, of the clerk of the circuit court, of the tax assessor, of the tax collector, and of the county treasurer, is a lien upon the property of the principal from the date of its execution; but said lien is discharged at the end of one year after the expiration of the term of office of the principal if no unsatisfied judgment exists against said bond, and no suit is pending thereon."

By separate letter you state that a part of the claim against Judge McNair's estate has been paid by a bonding company to the State of Alabama. You further ask, "What claim if any would the bonding company have?, or under what obligation and to whom would this money be due?"

In reply to your question concerning the claim of the bonding company, I wish to advise that a study of the file containing the report of the examiner of accounts made by the Comptroller's Office covering the charges made against Judge McNair, and a conference with the Comptroller reveals that there is yet a balance due to the State and county by Judge McNair. While the bonding company is subrogated to the rights of the State to the extent of the amount paid by them, there can be no payment by the county of the amounts due to Judge McNair until the amounts still due to the State and county by Judge McNair are paid.

I am therefore of the opinion that you cannot pay any amount to the bonding company until the full account to the State and county has been paid.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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October 3, 1938.

Hon. Wm. W. Hill,  
Judge of Probate,  
Montgomery County,  
Montgomery, Alabama.

License and Taxation—Person, firm or corporation engaging in the business of lending money on salaries or making industrial or personal loans, who engages in business in more than one county within the State, is required under Subsection 2 of Schedule 93½ of Section 348, and Section 350 (a,b) of the Revenue Act of 1935, to pay State and County license in each of the Counties in which he engages in business.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"On October 28, 1935, you rendered an opinion to this office to clarify some confusion that existed under Schedule 93½, page 39, of the printed 'license Privilege Tax' as it applied to subdivision 2 of said Schedule, and it appears in Volume 1 at page 125 of the Quarterly Report of the Attorney General.

"A recent opinion rendered by your office on November 20, 1937, to the Hon. Henry S. Long, Chairman, State Tax Commission, modifies the above referred to opinion insofar as its reasoning relates to subdivision 1 of Schedule 93½.

"Therefore, will you kindly advise this office as early as practicable what license tax is payable under subdivision 2 of section 93½, in case a taxpayer, engaged in the business of lending money on salaries or making industrial loans, maintains its principal office in some county other than Montgomery County, and maintains a Branch office in Montgomery County?"

In my opinion, Subsection 2 of Schedule 93½ of Section 348, and Section 350 (a, b) of the Revenue Act of 1935 require a person, firm or corporation engaged in the business of lending money on salaries or making industrial or personal loans to pay an annual State license of \$100.00 and County license of \$50.00 for each county in which he engages in business.

Schedule 93½ of Section 348 of the Revenue Act of 1935 provides:

"SCHEDULE 93½. 1. Each person engaged in discounting or buying CONDITIONAL SALES CONTRACTS, DRAFTS, ACCEPTANCES, NOTES OR MORTGAGES on personal property shall pay an annual license as follows: Employing Capital of:

|                                |         |
|--------------------------------|---------|
| "\$ 50,000.00 or less .....    | \$ 5.00 |
| 50,000.00 to 100,000.00 .....  | 10.00   |
| 100,000.00 to 150,000.00 ..... | 15.00   |
| 150,000.00 to 300,000.00 ..... | 25.00   |
| 300,000.00 to 500,000.00 ..... | 100.00  |
| 500,000.00 and up .....        | 300.00  |

"The payment of which shall be sufficient to engage in business in any county of the State except County in which principal office is located in which case County License shall be one-half of the above schedule.

"2. Each person engaging in business or lending money on salaries or making industrial or personal loans shall pay an annual license of one hundred dollars for each county in which they engage in business.

"3. Each person lending money on mortgages secured by real estate in this State shall pay an annual license, based on the amount of such loans made during any taxable year, as follows: Where the aggregate amount is:

|                                    |          |
|------------------------------------|----------|
| "\$10,000.00 to \$ 25,000.00 ..... | \$ 30.00 |
| 25,000.00 to 50,000.00 .....       | 50.00    |
| 50,000.00 to 100,000.00 .....      | 75.00    |
| More than \$100,000.00 .....       | 150.00   |

"This Schedule shall apply to all persons whether organized under the laws of this State or any other State or territory or county, the payment of the license in one county of the State as evidenced by license certificates of the Judge of Probate shall be sufficient; provided however that if an office is maintained in more than one county, the license shall be one-half of the above license payable in each additional county where an office is maintained. Provided that corporations or institutions organized under the Act of Congress, known as the Home Owners Loan Act of 1933, as amended or as hereinafter amended, and corporations or institutions organized by an Act of Congress known as the Federal Farm Loan Act, approved July 17, 1916, and amendment thereto, and Building and Loan Associations chartered under the laws of Alabama, and insurance companies and their agents which are otherwise taxed under the laws of this State shall not be required to pay a license under this Schedule. Provided further that nothing in this Schedule shall be construed as levying a license on charitable, religious, educational or fraternal organizations or institutions, nor to banking institutions organized as such under the laws of this State or national banks. No individual person who is a bona fide resident of this State and no guardian, trustee, executor, administrator, or other person in a representative capacity not professionally engaged in the business of loaning money, who shall lend his money or that of his ward, beneficiary, cestui qui trust or principal secured by mortgage on real property, shall be liable for any license under this Schedule.

The first opinion of this office, referred to in your inquiry, (Quarterly Report, Vol. 1, page 125) held that the clause appearing in Subsection 3, supra, "Provided however that if an office is maintained in more than one county the license shall be one-half of the above license payable in each additional county where an office is maintained", was applicable to the license provided for in Subsection 2, and that the proper tax payable by a person, firm or corporation engaging in the business of lending money on salaries or making industrial or personal loans was \$100.00 for the State and \$50.00 for the county in the county in which the taxpayer maintains his principal place of business, and \$50.00 for the State and \$25.00 for the county in each additional county wherein an office is maintained. This opinion was directed specifically to Subsection 2 of the said Schedule.

The second opinion of this office, referred to in your inquiry (Quarterly Report, Volume 9, page 104), was directed to the question of the proper license under Subsection 1 of Schedule 93½, payable by a taxpayer engaging in the business of discounting or buying conditional sales contracts, drafts, acceptances, notes or mortgages on personal property, in case where the taxpayer maintained offices in more than one county in the State. The conclusion there was that persons procuring licenses under Subsection 1

would have the right to select the county of the location of its principal office, and when this selection has been made, state and county license must be paid in that county only, upon the total capital employed in the conduct of all its business in all of the counties of the state in which it has business.

The conclusion of the second opinion was opposed to that announced in the first opinion cited, wherein it was stated:

"The statute as written is not at all clear as there seems to be a specific provision in each of the different classifications set out under Schedule 93½. However, the proviso does not refer to either of the separate classifications but says, 'this schedule' which is all inclusive and unless controlled by the specific language of the particular subdivisions of the schedule would apply to the entire schedule."

In the subsequent opinion (Volume 9, page 104) it was considered necessary to modify the prior opinion (Volume 1, page 125) to disapprove the excerpt therefrom quoted hereinabove. To this extent the opinion appearing in Volume 1, *supra*, was modified, and *ergo*, overruled. I reiterate that the opinion appearing in Volume 9 was in no wise directed to any question other than the proper license tax payable under Subsection 1 of Schedule 93½.

However, (in view of your present request, which brings the conclusion of the opinion appearing in Volume 1 directly into question) upon more mature reflection, I have concluded that the several subsections of the Schedule are separate, and that the limitation appearing in Subsection 3 was not intended by the Legislature to apply to Subsection 2. In view of this conclusion, the opinion appearing in Volume 1, *supra*, is hereby withdrawn and overruled in all of its aspects.

Section 350 (a,b) of the Revenue Act of 1935, provides:

"(a) Whenever a license is levied in this Act, there shall be collected both a State and County license for each place of business, except as specifically otherwise provided."

"(b) There is also hereby levied for the use of each county in the State a license or privilege tax upon each person, firm or corporation engaged in, or who shall carry on any of the occupations, business, professions, or callings, or shall exercise any privilege or do any act for which a license is charged by the State, of fifty per cent of the State License or privilege tax, except as herein otherwise provided."

It is my opinion that the proper license tax payable by persons, firms or corporations engaged in the business of lending money on salaries or making industrial or personal loans is \$100.00 for the State and \$50.00 for the county, payable in each county in which they engage in business.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

October 4, 1938.

Hon. J. S. Sandlin,  
Sheriff, Morgan County,  
Decatur, Alabama.

Vending machine not "store" within meaning of Chain Store Act (Revenue Laws of 1935, Schedule 155 et. seq.)

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 13, 1938, in which you request my opinion as follows:

"Please give me your official opinion on the following:

"The Store License Department demands \$4.50 1936-37-38 store license from an individual who operates a Coca-Cola vending machine, solely for the convenience of the courthouse employees here, is this a just and proper claim and should it be paid."

In my opinion, it was not the legislative intention to include a vending machine within the term "store" as defined in Article XII, Chapter 3, Schedule 155 et seq.

The intent of the lawmaker is the law. **Birmingham vs. Southern Express Co.**, 164 Ala. 529, 51 So. 159.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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October 4, 1938.

Hon. Fred H. McDuff,  
Sheriff, Jefferson County,  
Birmingham, Alabama.

Cigarette vending machines—Sales to minors—Mere placing of cigarette vending machine in public location not unlawful, but sale by means of such machine renders owner or operator criminally liable under Section 3567 of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Loeb.



Dear Sir:

I have your letter of September 8, 1938, in which you request my opinion as follows:

"A number of automatic vending machines which release cigarettes upon the insertion of coins in slots are located in places easily accessible to the public in the corridors of buildings and in the lobbies of drug stores, hotels, and the like, in the City of Birmingham. They are not placed behind counters in stores, but are open to operation equally efficiently by coins placed therein by a minor as to coins inserted by adults. There is no custodian of the individual machine present to prevent the operation thereof by minors. I have, as have several of my deputies, witnessed the operation of these machines by minors purchasing cigarettes by the insertion of coins in said machines and obtaining cigarettes therefrom, all of said transactions taking place in the presence of the proprietors or employees of the establishments without any interference, protest or action of any sort by said proprietors or employees.

"Please advise:

"1. Whether this mode of operation of automatic cigarette vending machines is a violation of Section 3567 of the Code of Alabama.

"2. If the machines are placed behind counters in stores so the intervention of salesmen becomes essential, either in the deposit of coins or in admitting the purchasing public back of the counter, would this mode of operation be permissible and not in violation of Section 3567?

"I understand that a similar situation has been passed upon in the following two cases:

"Gunding v. City of Chicago, 176 Ill. 340, Affirmed in 177 U. S. 183;

Illinois Cigarette Service Co. v. City of Chicago, 89 Fed. (2nd) 610."

In my opinion, the mere placing of the cigarette vending machines in the locations mentioned in your inquiry does not constitute a violation of section 3567 of the Code of Alabama of 1923.

Section 3567 of the Code prohibiting the sales of cigarettes to minors reads as follows:

"3567. Selling cigarettes to minors; jurisdiction of justices.—Any person who sells, barter, exchanges, or gives to any minor, any cigarettes, or cigarette tobacco, or cigarette paper, or any substitute for either of them, must, on conviction, be fined not less than ten nor more than fifty dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than thirty days; and justices of the peace and notaries public with the powers of justices of peace, have jurisdiction of such offense concurrent with that of the county court."

You will note that the prohibition is against "any person who sells etc." While we are fully aware of the iniquitous consequences of permitting the placing, in unsupervised locations, of machines which cannot discriminate between a proper customer and one who is under age, we are constrained to hold that such placing does not, in itself, contravene Section 3567, *supra*.

However, the person owning or operating the cigarette vending machine cannot avoid culpability through the medium of such machines, in the event minors purchase cigarettes therefrom for the reason that intent is not an element of the offense defined by Section 3567. See *State v. Southern Express Co.*, 200 Ala. 31, 75 So. 343; *Smith v. State*, 223 Ala. 346, 136 So. 270. In such event, there would result a sale by means of the machine, an instrumentality of the owner or operator thereof, and such sale would constitute a violation of the statute. The owner or operator of such machine is criminally responsible for any illegal sales made by means of the machine for it will be presumed that at the time the machine was placed in the location there existed a knowledge, born of common experience, that perhaps there would be sales made to minors. It is the duty of the owner or operator of such machine to so operate it or to surround it with such surveillance as will prevent prohibited transactions from being carried on, i. e., sales to minors. Where the owner or operator fails to furnish such protection, he is criminally responsible under Section 3567, *supra*, should there result a sale to a minor.

The two cases cited by you in your inquiry, *Gunding v. City of Chicago*, 176 Ill. 340, affirmed in 177 U. S. 183; *Illinois Cigarette Service Co. v. City of Chicago*, 89 Fed. (2nd) 610, are not applicable to the foregoing conclusions. These cases do, however, confer authority upon a municipality to adopt an ordinance under their police power forbidding the operation of cigarette vending machines.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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October 5, 1938

Dr. W. D. Partlow, M. D.,  
Superintendent, Alabama Hospitals and Partlow State School,  
Tuscaloosa, Alabama.

The Board of Trustees of the Alabama Insane Hospitals and the Board of Managers of the Partlow State School for Mental Deficients may legally delegate to the Superintendent thereof the authority to enter into contracts and agreements with architects and contractors, and to perform other executive and administrative duties in connection with a building program sponsored under P. W. A. regulations.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of recent date, which is as follows:

"The Board of Trustees of the Alabama Insane Hospitals and The Board of Managers of the Partlow State School for Mental Deficients anticipating application for P. W. A. Grant to match state funds for construction and equipment of buildings, in regular meetings adopted resolutions authorizing me as Superintendent to enter into contracts and agreements with architects, contractors, etc. and to perform any other executive or administrative duties arising in connection with a program of building under P. W. A. regulations."

"To be prepared in case the question may arise as to the Board's authority or right to delegate this authority to me or to empower me as Superintendent to act in the capacities suggested above, will you please give me an opinion on the above?"

Section 1432 of the Code of 1923, in my judgment, clearly gives the Board of Trustees of the Alabama Hospitals authority to vest in the Superintendent of such hospitals the power and authority to do all things in connection with the management and affairs of the institutions which they themselves could legally do, including the authority to enter into contracts and agreements with architects and contractors in connection with a Public Works Administration building program, insofar as the actions of said Superintendent are in conformity with the rules and regulations adopted by the Board of Trustees. The pertinent part of Section 1432 is as follows:

"For the immediate managing and government of the hospitals, the Board of Trustees shall elect a superintendent, determine his term of office, and fix his salary. In the discharge of his duties, the Superintendent shall be the executive officer of the Board and be held strictly accountable to them."

In my judgment, the Board of Trustees may legally delegate to the Superintendent of the hospitals any powers which they deem proper, incident to the management and government of the hospitals.

It is my opinion that the Board of Managers of the Partlow School for Mental Deficients can likewise vest in the Superintendent of that institution the power and authority to enter into contracts and agreements with architects and contractors in connection with a P. W. A. building program, and to perform other executive and administrative duties arising in connection with a program of building under P. W. A. regulations.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

October 5, 1938.

Hon. W. J. Bird,  
Judge of County Court,  
Russell County,  
Phenix City, Alabama.

Purchase of office supplies, including typewriters for the use in the office of the Judge and the office of the Clerk of the County Court, Russell County, Alabama, properly payable out of the "County Court fund" created by Local Acts of Alabama, Extra Session, 1936-1937, page 22.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your inquiry, which is quoted as follows:

"House Bill No. 212 approved February 1, 1937, creating the County Court of Russell County, Alabama, providing, among other things, that all money paid into said County Court shall be deposited in a separate fund known as the 'County Court Fund' and that all expenses of said Court shall be paid out of said 'County Court Fund'.

"Kindly advise if we may buy two typewriters, one for the use of the Judge of the County Court and one for the use of the Clerk of the County Court, and pay for both of them out of the 'County Court Fund'.

"The office of the Judge and the office of the Clerk are in separate buildings, and we are badly in need of a typewriter for each office."

Local Acts of Alabama Extra Session 1936-1937, page 22, creating the County Court of Russell County, Alabama, insofar as the same is pertinent to your inquiry, is quoted as follows:

"SECTION 10. The maintenance of said Court shall be the same as provided by law for the maintenance of County Courts, except that any amounts expended therefor shall be paid out of the County Court fund."

The proper maintenance of the Court involves the supplying of the officers and offices thereof with necessary books, stationery, and supplies. The Supreme Court of Alabama in the case of *Underwood Typewriter Co. v. Marengo County Bank*, 82 So. 158, 203 Ala. 128, held that a typewriter comes within the terms of a statute providing for "stationery" for public offices, and that the same can be supplied as such when the nature and the character of the office is such as to require a typewriter in the discharge of the duties incident thereto.

In view of the above, I am of the opinion that the character of the offices of Judge and Clerk of the County Court of Russell County, Alabama,

are such as to require typewriters in the discharge of the duties incident to such offices; and, that the purchase price of typewriters to be so used is a proper charge against the County Court Fund.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

October 7, 1938.

Hon. Charles W. Lee,  
State Comptroller,  
Capitol.

Under authority of the case of Gaston Scott, President et al v. Charles W. Lee, as State Comptroller, October Term, 1938, the State Comptroller is authorized to transfer lubricating oil tax funds from the General Fund to the Gasoline Fund.

Opinion by the Attorney General.

Dear Sir:

I have your letter of October 6, 1938, as follows:

"At the October Term of Supreme Court 1937-38, said Court handed down a decision in the case of Gaston Scott, President et al of the State Highway Department v. Chas. W. Lee, State Comptroller, dealing with the distribution of the tax on lubricating oil.

"This Supreme Court decision reversed the decision of the lower Court and remanded the same for a new trial.

"Please advise me if I have authority to transfer the amount of lubricating oil tax from the General Fund to the Gasoline Fund under the decision of the Supreme Court without a new trial from the lower Court."

Your inquiry involves a construction of a decision of the Supreme Court of Alabama handed down in October, 1938, in the case of Gaston Scott, President et al v. Chas. W. Lee, as State Comptroller.

You inquire whether you have authority to transfer the lubricating oil tax from the General Fund to the Gasoline Fund under the decision of the Supreme Court referred to above.

The writer has examined both the majority opinion and the minority opinion in the above case. My understanding is that there is approximately \$189,000 involved, representing lubricating oil revenues collected over a period of approximately one year.

It is my judgment that there can be no question about your authority to forthwith transfer to the Gasoline Fund (Highway Department) the \$189,000 (the lubricating oil tax in whatever amount). The decision of the Supreme Court mentioned hereinabove is your specific authority for such action on your part.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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October 14, 1938.

Hon. Eugene H. Hawkins,  
Judge of Probate,  
Jefferson County,  
Birmingham, Alabama.

Tax Sales—Authority to set aside—

After valid sale of property for non-payment of ad valorem taxes, the U. S. District Court, in Bankruptcy, is not authorized to set aside the same, upon subsequent adjudication of taxpayer's insolvency, on the ground that the assessment against the property, in the opinion and judgment of the court, was excessive.

Opinion by the Attorney General.

Dear Sir:

I have your letter of August 9th, in which you propound the following question:

What authority have the United States District Courts to set aside sales for State, County and City taxes on the ground that the assessment of the property involved was too high, and to order lesser amounts to be paid in full satisfaction of State, County and City tax liens?

Section 17 of the Bankruptcy Act provides that such taxes are not dischargeable in bankruptcy. However, Section 64-a reads as follows:

"The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, County, district, or municipality in advance of the payment of dividends to the creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the Court."

I have carefully studied the authorities listed in your letter and find that there is a diversity of opinion as to how far the District Courts of the United States may go in determining the amount or legality of such taxes. In the case *Matter of Schach* 32 ABR-ns 428, 17 Fed. Sup 437, the Court stated:

"In *Re Gould*, supra (29 ABR ns 733; 11 Fed. Sup. 644) is directly in point in this case. There a tax had been levied upon real estate based upon an assessment. The trustees contended that the property had been over-valued by the assessor and that the amount of the tax levied was excessive. Judge Geiger in an exhaustive opinion reached the conclusion that a court of bankruptcy has no power to reassess the value of the property and to reduce the amount of the tax if it finds that the assessing bodies have overvalued it. With this conclusion I fully agree. It is not the function of the bankruptcy Court to act as a board of revision to supervise the legally constituted assessing bodies." (Underscoring ours).

In none of the cases cited has the property in question been divested out of the bankrupt by a sale. I understand from your letter that in all of the cases to which you refer, the title to the property in question has been divested out of the bankrupt by a tax sale. If I am correct in this assumption and the bankrupt had failed to avail himself of the administrative remedy provided by law (*Gorham Mfg. Co. v. State Tax Commission*, 69 L. Ed. 279, 266 U. S. 265) I am of the opinion that the United States District Courts have no jurisdiction over said property and, therefore, have no authority to reduce in amount the taxes due on said property. Section 70 of the Bankruptcy Act vests in the Trustees of the estate, as of the date he was adjudged bankrupt among others.

"Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

If the right of redemption from the tax sale had expired, I am of the opinion that the United States District Courts are without authority to force you to accept any lesser sum than that due under the tax sales as shown by your records, and I am also of the opinion that the said Courts are without authority to require you to accept any lesser sum after a sale for taxes. From your letter it would appear that you are only asking for an opinion as to the authority of said Courts after a tax sale has been had.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

October 14, 1938.

Hon. Joe Patton,  
Tax Collector,  
Sumter County,  
Livingston, Alabama.

Taxation—Municipal corporations not entitled to ten per cent penalty imposed upon delinquents who fail to assess property before

the third Monday in January, under Section 44, Alabama Revenue Laws 1935, by virtue of Section 201, Alabama Revenue Laws, 1935.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

Your letter of August 20, 1938, received, which is as follows:

"Please refer to Attorney General's opinion rendered under date of May 6th, 1930, by Charlie C. McCall, Attorney General at that time and advise me if same is still the law with reference to the collection of municipal taxes on the 10% penalty etc. This opinion can be found on page 823 of the Attorney General's Report for October 1st, 1928 to Sept. 30th, 1930."

The opinion to which you refer is based upon a construction of Section 3095 of the Code of 1923, which contains the provision that any municipal corporation may provide for the assessment, equalization and collection of taxes due such municipal corporation, by the tax assessor and tax collector of the county; and, an Act approved August 22, 1923, (General Acts 1923, p. 175, Section 37) which provides that a penalty of ten per cent of the taxes to be assessed, shall be imposed upon delinquents who fail to furnish the tax assessor with a list of their taxable property before the first Monday in February. The Attorney General concluded that it was not the legislative intent to allow municipalities the ten per cent penalty which is imposed upon delinquents who fail to assess their property for taxation before the first Monday in February.

It is my conclusion that the above opinion states a proper construction of the law.

The above referred to Section 3095 of the Code of 1923 is incorporated in its entirety in the Alabama Revenue Laws of 1935 as Section 201; and, the above referred to Act approved August 22, 1923, (General Acts 1923, p. 175, Section 37) is also incorporated in the Alabama Revenue Laws 1935 as Section 44, but amended to provide that a list of taxable property be filed on or before the third Monday in January instead of the first Monday in February as set out in said Act.

Since Section 44 of the Alabama Revenue Laws 1935, is penal in its nature in that it provides for a penalty of ten per cent of the taxes to be assessed for failure to list taxable property on or before the third Monday in January, it cannot be extended by implication. Statutes may impose penalties for tax delinquencies but they must be strictly complied with, because such laws are penal and must be strictly construed.—*Reynolds, Sheriff et al. v. Fabritis*, 172 So. 889, 233 Ala. 625; *Gachet v. McCall*, 50 Ala. 307.

Section 201 of the Alabama Revenue Laws 1935 merely adopts in very general terms the existing machinery for the assessment, equalization and collection of State and County taxes, and does not specifically state that a penalty may be imposed for delinquent listing of taxable property by a municipality. As stated by Justice Gardner in *City of Opp v. Brogden et al.*, 181 So. 752:



"The language of Sec. 201 of the Act (Sec. 3095, Code) is broad, and it is evident the lawmakers intended, by so comprehensive an adoption for the municipal corporations of the laws relating to the subject matter dealing with the State and Counties, to leave the details of practical operation thereof to be supplied by judicial construction of the several statutory provisions. And in so doing, little aid was given in the matter of proper interpretation."

As Section 201 of the Alabama Revenue Laws 1935 is so meager in its terminology, it is my opinion that it was not within the purview of said statute to permit municipalities to collect the ten per cent penalty imposed upon delinquents failing to list their taxable property on or before the third Monday in January.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

October 18, 1938.

Hon. James A. Blue,  
Secretary-Treasurer,  
Board of Dental Examiners of Alabama,  
1016 Comer Bldg.,  
Birmingham, Alabama.

Dentistry—

1. Board of Dental Examiners of Alabama cannot issue a temporary permit for a dentist to practice in the State of Alabama.
2. The issuing of said temporary permit by Board of Dental Examiners of Alabama would be in violation of the law.

Opinion by Assistant Attorney General Farnell.

Dear Sir:

I have your request of October 3rd, as follows:

"Can the Board of Dental Examiners of Alabama at a called meeting of the Board issue a temporary permit for a dentist to practice in the State of Alabama until the next regular annual meeting of the Board, at which time he will be given the regular examination.

"Would the issuing of the temporary permit be in violation of the law?

"A prompt answer will be greatly appreciated, as the question is up at the present time."

It is my opinion that the Board of Dental Examiners of Alabama, at a called meeting, cannot issue a temporary permit for a dentist to practice in the State until the next annual meeting of the Board. Section 327 of the 1923 Code of Alabama sets out the requirements of an applicant to the Board of Dental Examiners for a certificate to practice dentistry. Among the many requirements stated in said application is that said applicant must "submit to an examination, both practical and theoretical, as to his or her qualifications for registration as a licensed dentist."

Section 328 of the said Code deals with the qualifications of a dentist. Among the many qualifications that a dentist must have is: **"Shall pass a satisfactory examination before said board of Dental Examiners of Alabama."**

Section 329 of the said Code deals with the certificate to practice dentistry and when the same is to be granted. The first sentence of said Section provides **"upon examination and investigation"** should the Board of Dental Examiners find that the applicant has met all the many requirements as set out then in that event a certificate will be granted to the applicant to practice dentistry.

In view of the many requirements set out in Section 327, Section 328 and Section 329 it is my opinion that the Board of Dental Examiners of Alabama are absolutely without authority to issue a temporary permit or certificate to practice dentistry. A Board created by a legislative Act does not have any power except that which is expressly or impliedly given from the wording of the Act. I do not find any implied authority set forth in the above mentioned sections on which the said Dental Board of Examiners might issue a temporary permit or certificate to practice dentistry.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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October 20, 1938.

Hon. J. Calvin Hollis, Sheriff,  
Hale County,  
Greensboro, Alabama.

The Sheriff is entitled to a 65c fee for serving and returning subpoenas that are issued for witnesses to appear in Probate Court.

Opinion by Assistant Attorney General Ward.

Dear Sir:

I have your request for opinion as follows:

"Will you please give me a ruling on the following?

"Subpoenas are issued by the State for witnesses to appear in Probate Court for various reasons and I, as Sheriff of Hale County, have to

serve these subpoenas. I should like to know if I am entitled to a 50c fee in such cases."

I do not know that this question is entirely clear to my mind since I do not recall any case except perhaps in a condemnation proceeding where the County has failed or refused to take the proper steps to condemn private property for public use, in which the State would be interested in having subpoenas issued for witnesses to appear in Probate Court. There might be other cases in which the State would have such an interest, which do not occur to my mind at present. However, in either event, I do not find any law which entitles the Sheriff to a 50c fee for serving and returning subpoenas.

In my opinion, Section 7287 of the Code of Alabama, 1923, which is the Section fixing fees to be allowed Sheriffs, completely answers the above question, and in said schedule of fees of Sheriffs the following provision is made:

"Summoning each witness and returning subpoenas ..... 65c."

Sections 7242 and 7243 of the Code of Alabama, 1923 provide that witnesses before the Court of County Commissioners or similar court of like jurisdiction, and witnesses summoned in ad quod damnum proceedings, to assess the damages to real estate from taking land, are to be compensated and allowed the same fees as in Circuit Court. It would appear to be reasonable and right that the Sheriff should also be compensated in the same measure for serving and returning subpoenas on witnesses in these two instances and certainly under the general rule the Sheriff is entitled to receive a 65c fee for his services for summoning each witness and returning subpoenas.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

October 20, 1938

Brigadier General John C. Coleman,  
The Adjutant General,  
Capitol.

National Guard—Disposition of unexpended balances of general appropriations.

1. Under Section 16 of the Military Code of 1936 (Acts 1936, pages 105, 109) the Adjutant General, with the approval of the Governor may distribute unexpended balances of regular military appropriations to the units of the National Guard for the purpose of building and equipping armories for said organizations.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"The following unobligated funds of the 1938 Fiscal Appropriation are available for transfer to the item of 'Quarterly Allowances':

|                                                              |            |
|--------------------------------------------------------------|------------|
| "Salaries & Wages .....                                      | \$1,800.00 |
| Maintenance and Rifle Ranges .....                           | 685.00     |
| Travel Expenses, Other than State-owned Motor Vehicles ..... | 500.00     |
| Operation of Motor Vehicles, State-owned .....               | 100.00     |
| National Rifle Matches .....                                 | 200.00     |

"The organizations of the National Guard have, under the leadership and with the assistance of this office and of the State Armory Commission, in most instances, built new armories, the titles of which are in the State Armory Commission, with the aid of Federal funds allocated for that purpose. In many instances, the organizations have contributed to the cost of construction of said armories, and in many instances they have applied to the Armory Commission to borrow funds from private sources with which to complete said armories. In many instances, there are sums now due and unpaid upon the money so borrowed, which said sums have been or will be repaid from the 'Quarterly Allowances' to the several units.

"Will you please advise me if the unexpended balances of the regular military appropriation, itemized supra, may be distributed to the organizations as funds for aiding them in their armory building and equipping programs?"

In my opinion, your inquiry should be answered in the affirmative, provided the approval of the Commander-in-Chief, the Governor, is obtained for such distribution. Section 1, Subsection VI, of the General Appropriations Act (General Acts 1935, page 792, as amended by General Acts 1936-37, page 112) provides the "regular military appropriations." In Section 16 of the Military Code of 1936 (General Acts 1936, pages 105, 109) it is provided:

"And provided further:

"That balances of the regular military appropriation not otherwise approved for disbursement for other purposes, may be, if approved by the Commander-in-Chief, at the end of each fiscal year, covered into the Treasury as an addition to such sum as may be appropriated for the purpose of building armories for units of the National Guard and Naval Militia of Alabama."

As I understand your request for opinion, some of the units of the Alabama National Guard have completed their organization armories, by use of money borrowed to assist in said completion; and that some of said units have not completed their organization armories. It is my judgment that, if approved by the Commander-in-Chief (the Governor), the unexpended balances detailed in your request may be covered into the Treasury and dis-

tributed to the units of the National Guard for such purpose. The excerpt from the Military Code, quoted supra, necessarily excludes the idea that such unexpended balances should revert at all events to the General Treasury at the end of the fiscal year.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

October 21, 1938.

Dr. L. N. Duncan, President,  
Alabama Polytechnic Institute,  
Auburn, Alabama.

Board of Trustees of the Alabama Polytechnic Institute may legally delegate to the President of such institution the authority to act for the said Board of Trustees in all matters incident to negotiations between the Public Works Administration of the United States Government or other federal agencies and the Alabama Polytechnic Institute relative to the securing of funds with which to build certain structures for the Alabama Polytechnic Institute.

Opinion by the Attorney General.

Dear Sir:

I have your letter of October 20, 1938, requesting my opinion as follows:

"May the Board of Trustees of the Alabama Polytechnic Institute legally delegate to the President of said Institute the authority to act for said Board of Trustees in all matters incident to negotiations between the Public Works Administration of the United States Government or other federal agencies and the Alabama Polytechnic Institute relative to the securing of funds with which to build certain structures for the said Alabama Polytechnic Institute?"

I am of the opinion that the Board of Trustees of the Alabama Polytechnic Institute may legally delegate to the President of said Institute the authority to act for said Board in all matters incident to the negotiations concerning which you inquire.

Section 266 of the Constitution of Alabama provides for the management and control of the Alabama Polytechnic Institute by a Board of Trustees. Said section is as follows:

"266. The Alabama Polytechnic Institute, formerly called the Agricultural and Mechanical College, shall be under the management and control of a board of trustees, which shall consist of two members from the congressional district in which the institute is located, and one from

each of the other congressional districts in the state, the state superintendent of education, and the governor, who shall be ex officio president of the board. The trustees shall be appointed by the governor, by and with the advice and consent of the senate, and shall hold office for a term of twelve years, and until their successors shall be appointed and qualified. The board shall be divided into three classes, as nearly equal as may be, so that one-third may be chosen quadrennially. Vacancies occurring in the office of trustees from death or resignation, and the vacancies regularly occurring in the year nineteen hundred and five shall be filled by the governor, and such appointee shall hold office until the next meeting of the legislature. Successors to those trustees whose terms expire in nineteen hundred and three shall hold office until nineteen hundred and eleven; successors to those whose terms expire in nineteen hundred and five shall hold office until nineteen hundred and fifteen; and successors to those whose terms expire in nineteen hundred and seven shall hold office until nineteen hundred and nineteen. No trustee shall receive any pay or emolument other than his actual expenses incurred in the discharge of his duties as such."

There is no statutory enactment clearly defining the exact duties and authority of the President of the Alabama Polytechnic Institute.

Section 524 of the Alabama School Code of 1927, effective as of October 1, 1927, provides as follows:

"524. Organization and conduct of Institute.—The Board of Trustees have the power to organize the institute by appointing a corps of instructors, who shall be styled the Faculty of the Institute and such other instructors and officers as the interest of the institute may require; and to remove any such instructors or other officers, and to fix their salaries or compensation, and increase or reduce the same at their discretion, to regulate, alter, or modify the government of the institute as they may deem advisable; to prescribe courses of instruction, rates of tuition, and fees; to confer such academic and honorary degrees as are usually conferred by institutions of similar character; and to do whatever else they may deem best for promoting the interest of the institute. They shall also establish and maintain a military department in the institute, and elect a commandant and such other officers as may be necessary for the department." (Emphasis ours)

The part of the above section which is underscored has not been changed by the Legislature of this State since it was originally enacted into law. In fact, it has been readopted by various Legislatures since the time of its original enactment.

The Board of Trustees of Alabama Polytechnic Institute is required by law to meet only once each year although there is a provision made for calling special meetings (Alabama School Code, Section 527). It is a matter of record that the Board of Trustees of the Alabama Polytechnic Institute never meets more than twice in any one year. This is due partially to the fact that the Board is composed of members who are necessarily selected from the several congressional districts of the State as provided by Section 266 of the Constitution and Section 525 of the School Code and, therefore, their respective homes are many miles distant from the place where meetings of the Board of Trustees may be held.

As the said Board meets only occasionally and special meetings are extremely difficult to arrange, it has been the continuous practice over a long period of years for the Board of Trustees to delegate to the President of the Alabama Polytechnic Institute authority and powers practically unlimited in their scope. This delegation of authority to the President of the Institute found its basis in the provision underlined in Section 524, *supra*, i.e., that the Board had the authority "to do whatever else they (might) deem best for promoting the interest of the Institute." It will be seen, therefore, that the Board of Trustees obviously felt that the best interest of the institute could be promoted by delegating plenary powers to the President of the institution. This practice has gone on continuously and many Legislatures have assembled, charged with the knowledge of this practice but have never adopted any legislation which would prevent the Board of Trustees of said Institute from delegating such authority, but to the contrary, by re-enacting into law the provisions of the original act have placed their stamp of approval upon such practice.

Even if it could be admitted that the part of Section 524, *supra*, which authorizes the Board of Trustees to do those things which they deemed best for promoting the interest of the Institute does not specifically authorize the delegation of powers and functions and does not clearly enumerate the powers and functions to be delegated, I am constrained to the conclusion that the action of the Legislature, by its acquiescence in and re adoption of the mentioned provision, knowing full well that it was construed by the Board of Trustees to give them authority to delegate to the President of the institution such authority as they deemed advisable, is tantamount to an express legislative authority for such delegation.

The rule is stated in 59 Corpus Juris, p. 1025, as follows:

"The contemporaneous construction placed upon a statute by the officers or departments charged with the duty of executing it is entitled to more or less weight, especially if such construction has been made by the highest officers in the executive department of the government, or has been observed and acted upon for a long period of time, and while not generally controlling, where the case is not extreme and no vested rights are involved, such construction should not be disregarded or overturned except for the most cogent reasons, and unless clearly erroneous. \* \* \* In some cases the court has treated contemporaneous and long-followed construction of an ambiguous statute by executive officers or departments as controlling, or as having the effect of positive law, especially where vested rights are involved, or where the statute itself directs the executive department to make necessary regulations to carry out its purposes. \* \* \* Executive construction is entitled to additional weight where it has been impliedly indorsed by the legislature, as by the re-enactment of the statute, or the passage of a similar one, in the same or substantially the same terms, or by failure of the legislature, with knowledge of such construction, to change the law or adopt amendments urged."

The following Alabama cases enunciate the same principle of law: *State v. H. M. Hobbie Grocery Company*, 142 So. 46, 225 Ala. 151; *Shepherd v. Sar-tain*, 64 So. 185 Ala. 439.

The same rule is laid down in the following cases: *Simmons Company v. Commissioner of Internal Revenue*, 33 Fed. 2nd. 75, cert. den. 280 U. S. 588, *National Lead Company v. United States*, 252 U. S. 140.

In my opinion, the use of the words "to do whatever else they may deem best for promoting the interest of the institution" clearly evidences an intention on the part of the Legislature to give to the Trustees of the Alabama Polytechnic Institute the authority to delegate any and all duties incident to the operation, maintenance and management of the Alabama Polytechnic Institute in addition to those duties of a scholastic nature.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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October 21, 1938.

Dr. L. N. Duncan, President,  
Alabama Polytechnic Institute,  
Auburn, Alabama.

An adjourned meeting of the Board of Trustees of the Alabama Polytechnic Institute may be recessed from one date to another because of the lack of a quorum or for any cause deemed wise.

At such adjourned meeting, the Board of Trustees of the Alabama Polytechnic Institute may lawfully transact any business relating to the affairs of the Alabama Polytechnic Institute.

Opinion by the Attorney General.

Dear Sir:

This is to acknowledge receipt of your letter of October 20, 1938, wherein you request my opinion on the following question:

"Please advise if the Board of Trustees of the Alabama Polytechnic Institute in a regular annual meeting assembled at the Institute may at such meeting recess to meet again in an adjourned meeting, at a later date, and at such adjourned meeting, for lack of a quorum or for any other cause recess to an adjourned meeting at a still later date, and upon that date for lack of a quorum or for any other cause recess to an adjourned meeting at a yet later date, and at such adjourned meeting or meetings or at any subsequent meeting, lawfully transact any business relating to the affairs of the Alabama Polytechnic Institute."

It is my opinion that your question should be answered in the affirmative. I refer you to Section 527 of the Alabama School Code of 1927, which is as follows:

"Section 527. Meeting of Board of Trustees.—The Board of Trustees shall hold their meetings at the institute on the first Monday in June of each year, unless the Board shall in regular session, determine to hold its meetings at some other time and place; and upon the application in



writing of any four members of the board, the Governor shall appoint a special meeting, naming the time and place thereof, and cause notices thereof to be issued to the several members of the Board, but such meeting shall not be appointed for a day less than twenty days subsequent to the date of notice."

It is my judgment that the members of the Board of Trustees of the Alabama Polytechnic Institute may recess an adjourned meeting from one date to another and that at such adjourned meetings they may transact any business relating to the affairs of the Alabama Polytechnic Institute.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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October 21, 1938.

Dr. L. N. Duncan, President,  
Alabama Polytechnic Institute,  
Auburn, Alabama.

A special meeting of the Board of Trustees of the Alabama Polytechnic Institute, legally called, may be lawfully held even though it comes between a regular meeting of the Board of Trustees and an adjourned regular meeting of that Board.

Opinion by the Attorney General.

Dear Sir:

This is to acknowledge receipt of your letter of October 20, 1938, wherein you request my opinion as to whether or not the Board of Trustees of the Alabama Polytechnic Institute may legally hold a special meeting upon proper call between adjourned meetings of the regular annual meeting of said Board.

I am of the opinion that your question should be answered in the affirmative. I refer you to the provisions of Section 527 of the School Code of 1927.

It is my judgment that a special meeting of the Board of Trustees of the Alabama Polytechnic Institute may be lawfully held at any time regardless of the fact that such special meeting may fall upon a date between the regular annual meeting of the Board of Trustees and the date set for an adjourned meeting of the said annual meeting.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

October 24, 1938.

Hon. Gaston Scott, President,  
State Highway Commission,  
Montgomery, Alabama.

Highway Department — General Acts 1935, p. 70.

1. Where a contract for the construction of a road, includes a clause requiring the contractor to maintain a road for a period of time, the contract is not complete until the "maintenance period" has expired.

2. The completion of performance of a contract should be advertised after the maintenance period has expired.

3. The final estimate due under a contract may be paid thirty days after the contract is complete and project unconditionally accepted by the Highway Department.

4. Where the contract does not contain a provision for maintenance by the contractor, the final estimate may be paid within thirty days from the completion of the contract as evidenced by unconditional acceptance of the project by the Highway Department.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"This Department wishes to be advised on the following questions which have arisen and which are based on Section 5 of the above quoted Act:—

"1. When should a contractor advertise the completion of his work: During the maintenance period which begins at the completion of all pay items, or at the end of the 30 days maintenance period?

"2. When may the final estimate be paid: 30 days from the completion of the advertisement, 30 days from the end of the 30 day maintenance period, or 30 days from the date project is accepted by the State?

"3. In cases where maintenance is not required in the contract when may the final estimate be paid?

"The 30 day maintenance period which is referred to in the above question is the period in which the road is maintained by the contractor pending its final acceptance by the State Highway Department, if the said road has held up satisfactorily during this 30 day period. The Stand-

ard Specifications of the Highway Department on page 23, Section 5.10 contains the following provision:

"5.10. FINAL CONSTRUCTION INSPECTION. Whenever the work provided and contemplated by the Contract shall have been satisfactorily completed and the final cleaning up performed, the Highway Director shall, within ten (10) days, unless otherwise provided, make the 'Final Construction Inspection' for purposes of placing the work under the 'Maintenance Period.'"

In reply to your inquiry, Section 5.10 of the Standard Specifications of the Highway Department provides for a "maintenance period" which as explained in your letter is the period in which the road is maintained by the contractor pending its final acceptance by the State Highway Department. This "maintenance period" you advise me is ordinarily thirty days. Where Section 5.10 appears in a contract between the Highway Department and a contractor, this section of necessity becomes a part of the contract itself and therefore, until the "maintenance period" has expired, the work under the contract is not completed. That is, a contract is considered complete only after the Highway Department makes the "Final Construction Inspection" and after the "maintenance period" expires.

In reference to your first inquiry, Section 5 (General Acts, 1935, p. 70) provides in part as follows:

"The contractor shall immediately after the completion of the contract give notice of said completion by an advertisement in some newspaper of general circulation published within the city or county wherein the work has been done for a period of four (4) successive weeks. In no instance shall a final settlement be made upon the contract until the expiration of thirty days after the completion of same. \* \* \*"

Under the provisions of this act, it will be noted that advertising is to begin after the completion of the contract. As I stated above, the contract is not complete until after unconditional acceptance by the Highway Department, which cannot take place until after the "maintenance period" has expired. Therefore, it is my opinion that a contractor may advertise the completion of his work after the thirty day "maintenance period" has expired and there is an unconditional acceptance by the Highway Department at that time.

In reference to your second inquiry, you will note that Section 5, quoted above, provides that a final settlement on a contract cannot be made until the expiration of thirty days from the completion of the same. I construe this to mean "completion of the contract." As stated above, the contract is not completed until the maintenance period has expired, and advertising cannot commence until the "maintenance period" has expired. The advertising might be published within twenty-two days since it requires publication once a week for four successive weeks, but the section prohibits a final settlement until thirty days after the completion of the contract.

It is therefore, my conclusion that a final settlement cannot be made until after thirty days from the date the contract is completed and the Highway Department unconditionally accepts the same, which would be after the expiration of the "maintenance period."

In answer to your third inquiry, where Section 5.10 of the Standard Specifications of the Highway Department is not contained in a contract, so that a "maintenance period" is not required as a part of the performance thereof, the final estimate may be paid as provided for by Section 5, after the expiration of thirty days from the completion of the contract. It is to be noted that the contractor is still required to advertise the completion of a contract pursuant to Section 5, above quoted.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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October 26, 1938.

Hon. S. D. Bayer,  
Superintendent of Education,  
Eutaw, Alabama.

1. Expenses incurred by County Superintendent of Education for post office box rent, telegram and long distance telephone tolls may not be paid from public school funds.

2. Expenses incurred by County Superintendent of Education for post office box rent, telegram and long distance telephone tolls may be paid by Court of County Commissioners.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your inquiry as follows:

"This date Assistant Examiner Chas. C. Smith is filing claim against me for illegal payment of school funds as follows:

Reimbursement for Post Office Box Rent .....\$6.00

Telegram and Long Distance Telephone Calls ..... 1.20

"Will you kindly render an opinion

"First, as to whether or not the above amounts may be paid legally from Public School Funds, and

"Second, as to whether or not the above amounts may be paid legally by the Court of County Commissioners.

"Receipts for the above amounts are held by me.

"There is no telephone in this office."

Answering your first inquiry, there is no authority for the payment of post office box rent, telegram tolls, and long distance telephone tolls from Public School Funds; and I am of the opinion that such payments legally can not be made from such funds.

Answering your second inquiry, Article 7, Section 169 of the Alabama School Code of 1927, page 67, in so far as the same is pertinent to the question involved, provides as follows:

"The County Board of Revenue or Court of County Commissioners shall also provide necessary furniture, office equipment, stationery, postage, forms, and supplies required by the County Superintendent of Education and his assistants."

The Supreme Court of Alabama in the case of **Underwood Typewriter Company vs. Marengo County Bank**, 82 So. 158, held that the term **stationery** as now used in Section 9604, Michie's Code of Alabama, 1928 includes **typewriters**. In view of this Supreme Court decision, in my opinion, the word **postage**, being a charge for transmittal of messages or communications, should be liberally construed to include telegrams and long distance telephone calls; and, in that case, it would be proper for the Board of Revenue or Court of County Commissioners to reimburse the Superintendent of Education of the County in such amount as may be expended necessarily in that manner in connection with the official business of his office. Also, in my opinion, the word **supplies** as used in the above quoted excerpt from Alabama's School Code of 1927, should be liberally construed to permit the office of Superintendent of Education of the County to be supplied with a post office box and to permit the rent of the same to be paid by the Board of Revenue or Court of County Commissioners.

Therefore, in my opinion, items of expenses incurred for post office box rent, telegrams and long distance telephone calls in connection with the conduct and operation of the office of the County Superintendent of Education legally may be paid by the Board of Revenue or Court of County Commissioners of the County.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

October 26, 1938.

Mrs. F. C. Turner,  
Judge of Probate and County Courts,  
Washington County,  
Chatom, Alabama.

Corporations — Fees to be collected by Probate Judges—

Probate Judges are required to collect 15c for each 100 words of the Certificate of Incorporation; \$2.50 for examining the Certificate; \$2.50 for Secretary of State and \$5.00 Charter Fee where the capital

stock proposed is less than \$5,000 and where the proposed capital stock is more, \$1.00 for every \$1,000 proposed capital stock.

Opinion by Assistant Attorney General Farnell.

Dear Mrs. Turner:

Reference is made to your inquiry of recent date which I quote as follows:

"There has been filed with me under the corporation laws of the State, and especially under Sections 6964 et sequor thereof, certificate of incorporation for the above warehouse.

"The question of proper charges to be paid by the corporation to complete the corporation has arisen.

"Section 6967 provides for the filing of the certificate and recordation thereof;

"Section 6968 provides for the collection of 15c per 100 words for the recording and \$2.50 for examining the certificate;

"Section 6969 provides for a minimum Charter Fee of \$5.00, which should govern in this case as the authorized capital stock is only \$2,000.00 with \$1,200.00 paid up;

"Section 6975 provides for the filing of the certificate with the Secretary of State and payment of \$2.50 for the filing of such certificate.

"These are the only fees that we find under the 1923 Code of the State of Alabama, but the Amendments, as provided in the Acts of 1931 at page 566 et sequor, and the Acts of 1935 at pages 604 et sequor are somewhat confusing to me. I find a provision for the payment of the Permit fee of \$10.00 for permission to do business, and I refer you to the Act of 1931 at page 566, and this payment would require \$10.00 to be paid either at the commencement of the business, which will be on or about the 3rd day of October, 1938, or else any time prior to January 1, 1939, as we read the law.

"Please instruct me immediately in the premises and inform me as follows, to-wit:

1. Do I collect the \$2.50 as provided in Section 6968, the additional \$2.50 as provided in Section 6975, the additional \$5.00 Charter Fee as provided in Section 6969?

"2. Do I collect an additional fee of \$10.00 for Charter Fee, or is this covered in the charge for permit to do business?

"3. Am I still permitted to collect 15c per 100 words for recording?"

It is my opinion that the only fees you are required to collect under the law in connection with the **Certificate of Incorporation of Chatom-Farmers**

Warehouse, Inc. are set forth in the Code of 1923 under Sections 6968, 6969 and 6975. The answer to question number one set out above should be in the affirmative. Section 6968, Alabama Code, provides that a probate judge shall receive 15c for each 100 words of a certificate of incorporation and \$2.50 for examining the certificate. Of course, you are entitled to collect the \$2.50 for examining the certificate of incorporation and \$2.50 for the use of the state as provided for in Section 6975. Section 6969 provides that the incorporators shall pay to the Probate Judge for the use of the state \$1.00 for every \$1,000 of the proposed capital stock but in no case less than \$5.00. Since the particular corporation in question has an authorized capital stock of only \$2,000 you would be entitled to collect only \$5.00 as a Charter Fee.

In answer to question number two set out above, it is my opinion that you are not to collect an additional fee of \$10.00 for "Charter Fee." This is covered in the charge for permit to do business in the State but is not to be collected by you.

The answer to question number three as set out above should be answered in the affirmative. Section 6968 of the 1923 Alabama Code specifically provides that a Probate Judge shall receive 15c for each 100 words of the certificate of incorporation.

I find nothing in the Acts of 1931 and 1935 to effect the answer given, supra. The Acts of 1935, House Bill number 275 found at page 604, deals with the Incorporation, Organization and Regulation of Mutual Corporations Marketing and Purchasing Corporations or Associations of Agricultural products in this State. This Act and its provisions has nothing whatever to do with the fees to be charged by a probate judge in connection with charges made for filing and recording certificate of incorporation such as the one in question. The only fees you can collect from Chatom-Farmers Warehouse, Inc. are viz: 15c for each 100 words of certificate of incorporation; \$2.50 for examining the certificate; \$5.00 Charter Fee and \$2.50 for secretary of state.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

October 26, 1938.

Hon. W. H. Quillin, Judge,  
Law and Equity Court,  
Franklin County,  
Russellville, Alabama.

Act No. 126, p. 125, 1936-37, Special Session of the Legislature.

(1) A shoemaker is required to collect two percent sales tax on the leather and material furnished in the repairing of shoes.

(2) Where a shoemaker keeps an accurate record of leather and material furnished in the repairing of shoes he is only required to collect a sales tax on same but not on the labor required in making the repairs.

(3) If a shoemaker is unable to separate the value of the labor from the material used in repairing shoes then he is required to collect a sales tax on the entire job.

Opinion by Assistant Attorney General Farnell.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"A person here is engaged in the business of repairing shoes. He sews half soles on a pair of shoes and charges \$1.00 for the job, which \$1.00 includes pay for the labor and leather. He estimates that about one-half of this \$1.00 is for labor and about one-half is for the leather and material in doing the job.

"Please advise me if this shoe-maker is due to collect a sales tax from the owner of the shoes who has the work done? How much sales tax should he collect on this \$1.00 job? Should he collect sales tax on both the labor and material or should he just collect sales tax on the value of the leather and material. If he cannot estimate how much of this \$1.00 is for labor and how much of it is for material, would he be legally justifiable in not collecting any sales tax at all "

Subsection (e) of Section One of the above-mentioned Act defines "gross proceeds of sales" as follows: "The value proceeding or accruing from the sale of tangible personal property, including merchandise of any kind or character without any deductions on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, or any other expenses whatsoever, and without any deductions on account of losses \* \* \* ."

Subsection (g) of Section One of said Act defines "gross receipts" as follows: "The value proceeding or accruing from the sale of tangible, personal property, including merchandise and commodities of any kind or character, all receipts actual and accrued, by reason of the cost of the property sold, the cost of the material used, labor or service cost, interest paid, or any other expense whatsoever and without any deductions on account of losses."

Section Two of the above-mentioned Act provides "there is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against **gross sales, or gross receipts**, as the case may be, as follows: Upon every person, firm or corporation engaged or continuing within this State in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character."

It is my opinion that a shoemaker, who is able to keep an accurate record of all leather and material used in the repairing of shoes would only be required to collect a two percent sales tax on the value of the leather and material so used. Surely, should an individual go into a shoe shop and purchase a pair of half soles for shoes to take home with him, the shoe-



maker would only charge two percent of the gross sale. Should this same person get started for home, change his mind and go back to the shoemaker for him to put the half soles on his shoes, the shoemaker would not exact two percent for the labor in doing the work. It is my opinion that where it is impossible for the shoemaker to separate the value of the leather and material from the labor done in repairing a pair of shoes, in that event the shoemaker would be required to collect two percent on the entire job including both labor and material.

I find nothing in Section Four, **EXEMPTIONS**, that would exempt the shoemaker mentioned in your letter from collecting two percent tax on all leather and material furnished in repairing of shoes.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

October 27, 1938.

Hon. R. L. Bishop,  
Tax Assessor,  
Etowah County,  
Gadsden, Alabama.

Statutes — Sections 23, as amended by Acts 1936-37, p. 89, and 161-A, as amended by Acts 1936-37, p. 88, of the Revenue Act of 1935 are invalid for the reason that they are violative of Section 96 of the Constitution.

Officers - Commissions - Tax Assessors and Tax Collectors of the several counties of the state are entitled to the commissions provided for them, respectively, by Sections 22 and 161 of the Revenue Act of 1935, without any limitation.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"My term of office began October 1st, 1935. On July 10th, 1935, the Legislature of Alabama passed a general revenue bill, which by Section 23 thereof limited the compensation of Tax Assessors to \$5400.00 per annum and by Section 161-A limited the compensation of Tax Collectors to \$5400.00 per annum, under the authority of the Sparks amendment to the Constitution, which was by its terms effective until October 1st, 1935.

"1. Were the provisions of the Revenue Act, limiting the compensation of the Tax Assessors and Collectors who were elected in November, 1934, effective beyond October 1st, 1935?

"2. Are Tax Assessors and Tax Collectors, thus elected, entitled to all the commissions and fees earned by them under the law, notwithstanding the above sections of the Revenue Bill, purporting to limit their compensation?"

In my opinion, Sections 23, as amended by Acts, 1936-1937, p. 89, and 161-A, as amended by Acts 1936-37, p. 88, of the Revenue Act of 1935 are unconstitutional for the reason that they are violative of Section 96 of the Constitution of 1901, and, therefore, Sections 23-A and 161-B of the said Revenue Act are inoperative. /

These sections, as amended, which purport to limit the compensation of Tax Assessors and Tax Collectors of the several counties of the state affected thereby, are as follows:

"Section 23. The fees, compensation and earnings of the Tax Assessor allowed under the revenue laws of the State, shall not together with all other fees, compensations, allowance, and earnings to them, exceed Five Thousand Four Hundred Dollars (\$5,400.00), net annually. Provided that after the term of office beginning with the first of October, 1935, expires, then the fees, compensation, and earnings of the Tax Assessor allowed under the revenue laws of the State, shall not together with all other fees, compensations, allowance, and earnings to them, exceed four thousand dollars (\$4,000.00) net annually. After the payment of the salaries for clerks, typists, stenographers, and other office expenses in Counties where the Tax Assessor is not paid a fixed salary; and the expenses of the office in such counties for clerks, typists, stenographers, and other expenses shall not exceed in counties having a population according to the Federal census as follows: 10 to 29 thousand \$100.00 per month. 29 to 40 thousand \$150.00 per month. 40 to 50 thousand \$250.00 per month. 50 to 65 thousand \$350.00 per month. 65 to 85 thousand \$500.00 per month. 85 to 110 thousand \$750.00 per month. 110 to 125 thousand \$1,200.00 per month. 125 to 500 thousand \$2,500.00 per month."

"Section 161-A. The fees, compensations and earnings of the Tax Collector allowed under the revenue laws of the State, shall not together with all other fees, compensation, allowances and earnings to them, exceed Five Thousand Four Hundred Dollars (\$5,400.00) net annually. Provided, that after the term of office beginning with the first of October, 1935, expires, then the fees, compensation and earnings of the Tax Collector allowed under the revenue laws of the State, shall not together with all other fees, compensations, allowances and earnings to them, exceed four thousand dollars (\$4000.00) net annually, after the payment of the salaries of clerks, typists, stenographers, and other office expenses in Counties where the Tax Collector is not paid a fixed salary; and the expenses of the office in such Counties for clerks, typists, stenographers, and other expenses shall not exceed in counties having a population according to the Federal Census as follows: 10 to 29 thousand - \$100.00 per month. 29 to 40 thousand - \$125.00 per month. 40 to 50 thousand - \$150.00 per month. 50 to 65 thousand - \$200.00 per month. 65 to 85 thousand - \$250.00 per month. 85 to 110 thousand - \$300.00 per month. 110 to 125 Thousand - \$800.00 per month. 125 to 500 Thousand - \$1,500.00 per month."

The amendments of Sections 23 and 161-A made at the 1936-37 Session of the Legislature relate to the maximum allowances for clerical assistants and are not material to the constitutional question.

Section 407 of the Revenue Act of 1935 provides:

"Section 407. Except as otherwise provided in this Act, all the provisions of this Act shall go into effect on the first day of October, 1935."

The Revenue Act was approved on July 10, 1935, but its effective date, as relates to the above quoted provisions purporting to limit the compensation of the Tax Assessors and Tax Collectors of the several counties, is October 1, 1935.

Section 96 of the Constitution provides:

"96. The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

Section 96 is a limitation upon the power of the legislature to fix the commissions of county officers of the several counties (save, of course, those counties which have been taken without its operation by special amendments to the Constitution) in any manner and upon any scheme which upsets that uniformity which the Constitution makers had in mind in its ordination.

By the provisions of Sections 23 and 161-A, the effect is that in those counties where the compensation of the Tax Assessor and Tax Collector, determined according to the schedule of commissions laid down in Sections 22 and 161, will not exceed \$5,400.00, the maximum amount specified therein, the schedule of fees in Sections 22 and 161 shall apply; but, that in those counties where the application of the said schedule of fees will result in an excess over the said maximum amount specified in Sections 23-A and 161-B, there is substituted for the schedule of commissions a lump sum payment of said amount of \$5,400.00.

A case peculiarly in point is **Crow v. Board of School Commissioners of Mobile County**, 228 Ala. 107. There the court had under consideration Acts, 1927, page 263, which provided:

"That in counties of more than one hundred thousand population, and less than one hundred and fifty thousand population, according to the last Federal census or any subsequent Federal census, no fees nor commissions shall be allowed to tax collectors for collecting special county and district taxes now or hereafter levied for public school purposes, but in lieu thereof the tax collector in such counties shall receive a lump sum of one thousand dollars which shall be retained by him from the taxes so collected by him. The tax collector shall also retain, from such taxes so collected, one thousand dollars as compensation to be paid to the tax assessor for his services rendered in assessing such taxes, and the tax collector shall pay over to the tax assessor the said sum of one thousand dollars so retained by the tax collector for the tax assessor."

At the time of the enactment of the statute, Section 3048 of the Code provided the schedule of commissions for Tax Assessors and Tax Collectors

of the several counties of the state on taxes collected, including general state and county taxes, special taxes and special county and district taxes levied for public school purposes, as the means of determining their compensation. Speaking to the question the court said:

"The purpose and effect of the act of 1927, if it was constitutionally enacted into law, is not to abolish all of such commissions in the counties falling within the classification of the act, but to limit the commissions to state and county taxes, general and special, and abolish the commissions on a percentage basis on special county and district taxes levied for school purposes, substituting therefor a lump sum, and whether this lump sum be characterized as a 'fee', 'allowance', or 'salary' (*Autauga Banking & Trust Co. v. Allen*, 220 Ala. 478, 125 So. 805) it deals with, touches, and restricts, and therefore regulates the commissions of public officers in counties within the classification and offends the letter and spirit of section 96 of the Constitution."

**Cf. *Mobile County v. Byrne*, 218 Ala. 5; *Vaughan, Probate Judge v. State ex rel Barker*, 212 Ala. 461.**

So that, unless the cited provisions of the Revenue Act are taken without the operation of Section 96 of the Constitution by the so-called "Sparks Amendment" to the Constitution, Article 24, it seems that they must fall for the reason that they run afoul of said Section 96.

The Sparks Amendment provides:

"All provisions of the constitution which prohibit or restrict the legislature from decreasing or diminishing the salary, fees or compensations of any executive, legislative or judicial officer or of any public officer or of any officer holding any civil office of profit under this state or any county or municipality thereof, whether elected or appointed, during the term for which he shall have been elected or appointed are hereby suspended until October 1, 1935. Provided that from and after the first day of the month next succeeding the date of the ratification and adoption of this amendment no salary, compensation, fees or commissions paid to any officer under the state or any county or municipality thereof, shall exceed the sum of six thousand dollars per annum. Said limitation of \$6,000.00 to be inoperative after October 1, 1935. Any act of the legislature heretofore adopted decreasing or diminishing the salary, fees or compensation of any such officer or officers, and which by its terms is to become effective after the expiration of the present term of any such officer or officers, shall, by virtue hereof, become effective from and after the first day of the month next succeeding the date of the ratification and adoption of this amendment; Provided, however, that should the legislature adopt any other act or acts decreasing or diminishing the salary, fees or compensation of any such officer or officers during the term for which such officer or officers may have been elected or appointed in a larger amount, such subsequent act or acts shall control. Any other act of the legislature adopted prior to October 1, 1935, decreasing or diminishing the salary, fees or compensation of any such officer or officers, during the term for which such officer or officers may have been elected or appointed, shall be effective from and after the first day of the month next succeeding the date of the ratification and adoption of this amendment, or from and after the adoption by the legislature of any such act decreasing or diminishing the salary, fees or compensation of such officer or officers."

It is doubtful that Section 96 of the Constitution is one of the "provisions of the Constitution which prohibit or restrict the legislature from decreasing or diminishing the salary, fees or compensations of any executive, legislative or judicial officer" etc., which were undertaken to be suspended by the Sparks Amendment. Conceding, for the purpose of argument, that the Sparks Amendment was effective to suspend the provisions of Section 96 of the Constitution for the period for which it purported to be operative, nevertheless, Sections 23 and 161-A of the Revenue Act must fall for the reason that they are violative of said section.

Although the Revenue Act of 1935 was enacted on July 10, 1935, its effective date was October 1, 1935. And, conceding that the Sparks Amendment was effective to empower the legislature to enact Sections 23 and 161-A, at the time of their enactment (that is to say, July 10, 1935) nevertheless, the validity of the enactment of the provisions must be tested by the constitutional provisions in force at the time that they became law (that is to say, at their effective date). By its terms, those provisions of the Sparks Amendment which purported to suspend the provisions of the Constitution which prohibited the legislature from decreasing or diminishing the fees, salary or compensations of officers etc., expired at the end of September 30, 1935. The cited provisions of the Revenue Act of 1935 were not law at any time prior to October 1, 1935. And on October 1, 1935, Section 96 of the Constitution was fully operative as a restriction upon the power of the legislature to enact a statute not applicable to all of the counties of the state regulating the commissions of Tax Assessors and Tax Collectors of the several counties.

An illuminating opinion upon this principle was rendered by the Justices of the Supreme Court at the request of the Governor on the question of the constitutional validity of the Income Tax Act of 1933. **In re: Opinion of the Justices**, 227 Ala. 291. The Income Tax Enabling Act (Acts, Extra Session, 1933, p. 150) was approved April 17, 1933. At the time of its approval, Section 214 of the Constitution (as had been construed in *Eliasberg Bros. Merc. Co. v. Grimes*, 204 Ala. 492) stood as an insuperable barrier to such an enactment. At the same session, the Income Tax Amendment to the Constitution (Article 22) was, on April 17, 1933, proposed by the Legislature. The people adopted the amendment, at the election held for that purpose, on August 2, 1933.

The Governor's request sought the opinion of the Justices of the Supreme Court upon the validity of the Enabling Act, enacted under such circumstances. In speaking to the question, the Justices said:

"There is no contention that the income tax provided for by the Enabling Act just mentioned, is not in excess of the limitation provided in section 214 of the Constitution, and void, unless its validity is saved by the amendment, article No. 22, to which we have referred.

"The argument here made is that, since the Legislature had no power to impose a tax on income to that extent, when the Enabling Act was passed and approved, though it did have such right when it became operative, it was void when passed and approved, and that the subsequent effective adoption of article 22 of the Constitution did not validate it. \* \* \*

"So that the only question which we need to discuss is whether the Enabling Act was void when passed and adopted, because in violation of section 214 of the Constitution. \* \* \*

"A statute has not, *ex proprio vigore*, any force until it becomes the law of the land, and that is when, by its terms, it takes effect. (Citing cases).

"A statute passed to take effect at a future day is to be understood as speaking from the time it goes into operation, and not from the time of its passage. (Citing cases).

"Until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the Legislature and approved by the executive has no force whatever for any purpose. (Citing cases)

"We cannot concur in the contention that the act purported to legislate on a subject out of its domain. The subject of taxation was unquestionably within its domain, since it was not prohibited by the State or Federal Constitution. If it had attempted to prescribe a tax in excess of the limit fixed in section 214, presently operative, we may concede it would have been void, and not validated by the subsequent amendment. But it prescribed a limit which when operative should not be prohibited."

Here, we have the converse of the situation dealt with in the Opinion of the Justices, *supra*. The Sparks Amendment **may** have been effective to authorize Sections 23 and 161-A of the Revenue Act of 1935, at the time of their enactment, that is to say, July 10, 1935. But, at the time of their becoming the law of the land, that is to say, their effective date on October 1, 1935, the suspensive provisions of the Sparks Amendment had expired, and Section 96 of the Constitution was effective to limit the power of the legislature to enact them.

A former opinion of this office (Quarterly Report, Vol. III, page 165) addressed to the Probate Judge of Dallas County, held that Section 239 of the Revenue Act of 1935 was excepted from the operation of Section 407 thereof, and was effective from July 10, 1935, the date of its approval, upon the theory that inasmuch as any other construction would invalidate the same because of the provisions of Section 68, Constitution, application should be made of the rule of construction that, if there are two constructions which reasonably may be applied to a statute, the one resulting in holding it valid and the other resulting in invalidating the same, it is the duty of the expositor to adopt the construction which will uphold the validity of the statute.

The effect of the holding there was, that Section 239 of the Revenue Act of 1935, which reduced the fees of Probate Judges and Tax Collectors, **during the terms for which they were elected**, for services rendered in connection with tax sales, is not violative of Section 68 of the Constitution (which forbids such reduction during the then current term) for the reason that the suspensive provisions of the Sparks Amendment intervened to empower the legislature to make the reduction in fees effective during the then current terms of the officers; and that the legislature intended the provisions for the reduction to be effective on the date that the Revenue Act was passed

and approved (July 10, 1935) and did not intend to postpone its becoming the law until October 1, 1935 (at which time the suspensive provisions of the Sparks Amendment had expired).

The opinion neither considered the fact that, as to tax collectors, the new term began on October 1, 1935, nor the effect of the postponement of Section 239 to October 1, 1935, as being in compliance with, rather than violative of, Section 68, Constitution, insofar as the provisions as to tax collectors are concerned.

Of course, the legal principle employed in that opinion (that a construction which will uphold a statute must be adopted if it reasonably may be done) long has been applied by the courts. It is but another way of saying that a statute must be held valid unless its invalidity appears beyond reasonable doubt.

But the rules of construction for the interpretation of statutes are useful only in cases of doubt. *Kreutner v. State*, 202 Ala. 287. And the expositor must give effect to the plain and validly expressed intention of the legislature. *State v. Lane*, 181 Ala. 646. All particular rules for construing statutes must be regarded as subservient to the end of determining the legislative intention. *Middleton v. General Waterworks & Electric Corporation*, 25 Ala. App. 455, Cert. Den. 227 Ala. 217. And the intention of the legislature must be determined primarily from the language of the statute itself and not from conjectures aliunde. *Stebber v. State*, 26 Ala. App. 148, Cert. Den. 229 Ala. 88.

The legislature has unequivocally said in Section 407 of the Revenue Act that "except as otherwise provided in this act, all the provisions of this act shall go into effect on the first day of October, 1935." There is no provision in the Revenue Act which indicates or even intimates an exception of Section 239 from the operation of Section 407 postponing the effective date of the provisions to October 1, 1935.

On more mature reflection, I am persuaded that the reasoning on which the conclusion of the opinion to the Probate Judge of Dallas County is grounded is unsound. The opinion is, therefore, overruled and withdrawn.

I reiterate that I entertain the most serious doubt that the suspensive provisions of the Sparks Amendment were operative upon Section 96 of the Constitution. But because of the concession, made arguendo, that the Sparks Amendment may have suspended Section 96, I have reconsidered the Dallas County opinion.

The former opinions of this office appearing in Quarterly Reports, Vol. I, p. 154, Vol. III, p. 202, Vol. VI, p. 9 and Vol. IX, p. 134, and the opinions there cited, did not consider the constitutionality of the sections here discussed. But in view of the necessity of the ruling on the constitutional question presented in your request, the above enumerated opinions are withdrawn.

It is, therefore, my opinion that, inasmuch as Sections 23 and 161-A of the Revenue Act of 1935 are invalid, they were not effective to limit the compensation of Tax Assessors and Tax Collectors of the several counties of the

state; and that such officers are entitled to all the commissions and fees earned by them under the law, as if the enactment of said sections had never been undertaken.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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October 28, 1938.

Hon. L. W. Price,  
Judge of Probate,  
Conecuh County,  
Evergreen, Alabama.

License - Motor Vehicle.

(1) Owner of private coupe automobile who has placed a "contraption" in the place of the turtle-back for the purpose of conveying his hunting dogs to and from the chase is not required to purchase a truck tag for said vehicle.

Opinion by Assistant Attorney General Farnell.

Dear Sir:

I have your letter of October 14, 1938, in which you request my opinion as follows:

"Dr. H. C. Fountain of Evergreen is a fox hunter. Since he engages in the hunting of foxes, hounds are required. Dr. Fountain has a coupe automobile from which he has removed the turtle-back and on which he has built a contraption for hauling his dogs. He uses this automobile only for his private use and the part which he has improvised on the back is not used for commercial purposes, and is used for no other purpose than to haul his dogs when hunting or training them. He insists that he should be issued a private passenger tag for his vehicle. Will you please give me an opinion as to whether Dr. Fountain should purchase an automobile tag or a truck tag for this vehicle. Since automobile licenses will be delinquent after November 14th, I should like to have your opinion before that date."

It is my opinion that the above-mentioned automobile is not a motor truck as defined by Subsection (j) of Schedule 158 of the 1936 Alabama Revenue Laws. This office has ruled that where a private automobile has a removable rear seat and is equipped with a back door, same was to be classified as a motor truck and the owner was required to purchase a truck tag. (Quarterly Report of the Attorney General, Volume 4, page 173).

The above-mentioned automobile, in its modified form, was equipped primarily for the carrying of freight and merchandise. The automobile



referred to in your letter has not been taken from the private passenger car class since, in its modified form, it is not designed nor equipped primarily for carrying freight or merchandise but is to be used solely for the transporting of the owner's dogs to and from the chase.

It is my opinion that the sole question involved is whether or not the automobile in question in its modified form is designed or used primarily for carrying freight or merchandise. It is my opinion, from the facts stated in your letter, that this private automobile, in its modified form, is not equipped nor designed for the purpose of carrying freight or merchandise and therefore, the owner would only be required to purchase a private passenger tag. (Quarterly Report of the Attorney General, Volume 7, page 250).

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

October 28, 1938.

Hon. Frank M. Stewart,  
Executive Secretary,  
Alabama State Milk Control Board,  
Montgomery, Alabama.

Subject—Construction to be placed on provisions of Section 11 of the Milk Control Act (H. 311-Hamner) No. 163, approved July 9, 1935. (Gen. Acts 1935 p. 204).

1. License fees of milk distributors are determined wholly upon the basis of the number of gallons of milk handled by distributors and processors per day.

2. If a distributor ordinarily handles less than 500 gallons daily, but at some time during the year his receipts of milk or the amount of milk handled exceeds 500 gallons per day, he will be required to pay a license fee under the classification of those distributors handling more than 500 gallons but less than 1000 gallons per day. In other words, if a distributor for one day, one week or one month exceeds the amount of his classification, that fact will automatically require his license fee to be paid in the higher classification.

Opinion by Assistant Attorney General Ward.

Dear Sir:

I have your request for opinion as follows:

"1. Upon what basis are license fees of distributors determined?

"2. If a distributor ordinarily handles less than 500 gallons of milk daily, but at some time during the year his receipts of milk or the amount of milk handled exceeds 500 gallons per day, will he be required to pay license fee under the classification of those distributors handling more than 500 but less than 1000 gallons per day, in other words, if a distributor for one day, one week or one month exceeds the amount in his classification, does that automatically require a license fee to be paid in the higher classification?"

From a casual reading of Section 11 of the Milk Control Act (H. 311-Hamner) No. 163, approved July 9, 1935, which said section deals with the question of license fees, it is apparent that license fees of distributors are determined solely upon the basis of the number of gallons of milk handled by a distributor or processor per day. Ample authority for the use of such a basis in determining said license fees is found in the Code of Alabama, 1923, Section 2153, et seq., as well as in our Supreme Court decision.

Upon a careful study of the Act hereinabove referred to, it is my opinion that the Legislature clearly intended to fix and regulate the different classifications of milk distributors and processors, and particularly to fix a maximum number of gallons handled by a distributor per day in each classification, which could not be exceeded in any one day, week or month during the year without subjecting said distributor to the increased license fee required for those doing business in the higher classification.

Section 11 provides as follows:

"LICENSE FEES: All persons required by this Act to be licensed shall pay a yearly license fee computed upon the following rates: STORES . . . . . Two and One-half Dollars (\$2.50) each per year. Any person operating two or more stores shall obtain a license for each store and pay a license fee of (\$2.50) each per year on each store."

Anyone placing a reasonable construction on this provision of the Act would be compelled to say that it means literally what it says, for if a person were engaged in the operation of three such stores for which he had paid the required license, and later saw fit to open a fourth store, it could not be argued that he would not be required to pay a license fee of \$2.50 for said fourth store. To my mind, it would be just as reasonable to say that such a person might open and operate a fourth store without being required to pay the additional license fee of \$2.50 on said fourth store as it would be to hold that one who had taken out a license as a distributor or processor, under the terms of which he was permitted to handle more than 100 gallons of milk per day, but less than 500 gallons per day, might be permitted to exceed the 500 gallons per day limit without being required to pay a license fee required in the higher classification.

In Section 11 we also find the following provision:

"PRODUCERS: An amount equal to fifty cents (\$.50) per cow, dry or milking over two years old. Provided that each person, firm or corporation shall be exempt from the payment of said license tax on five cows or less. For the purpose of determining the total amount of such producer's fee, the Board shall calculate the same upon the largest number of cows in each producer's herd or herds at any time during the

license year, and in the event any producer acquires or uses additional cows during the license year, he shall pay an additional fee of Fifty Cents (\$.50) for each additional cow."

In like manner, it would appear to be a proper rule in reaching a determination of the total amount of license fee to be required of distributors of the total amount of license fee to be required of distributors and processors, to calculate the same upon the largest number of gallons of milk handled per day by a distributor or processor, and to hold that, at any time during the license year and in the event any distributor or processor went beyond the maximum number of gallons permitted to be handled by him under the classification for which his license was issued, he should be required to pay the license fees provided in the higher classification.

In the case of **Ridgeway v. City of Bessemer**, 64 So. 189, which had to do with an interpretation of an ordinance imposing a license tax upon various businesses carried on in the City of Bessemer, and which provided for payment of a license tax.

"20 cows or less, \$1.00 each cow, all over 50c each,"

the Court recognized that the ordinance was valid on its face and that the amount exacted for continuing the business could not be said to be unreasonable. Pelham, J. in discussing this case, had this to say:

"And, if an improper amount of license tax be exacted or demanded because of making an incorrect count of the cows so employed or because of including animals not used in conducting the business licensed, that is not a matter that can be inquired into in a proceeding of this kind where the validity of the ordinance and the jurisdiction of the court are the only proper and legitimate subjects of inquiry, and not the guilt or innocence vel non of the petitioner."

Certainly no person would say that, under the provisions of said ordinance if a person had applied for and obtained a license to operate a dairy using only ten cows, he could thereafter have employed the use of eleven cows without paying therefor the additional license fee of \$1.00 for the additional cow.

In Corpus Juris, Volume 37, page 232, is found the following observation:

"AMOUNT OF FEE OR TAX: Subject to the limitation that the amount of the fee or tax must be reasonable in amount, the license fee or tax on vehicles may be fixed at a specified sum; or it may be based on or graded according to the type, size, use, number of horses, horsepower, etc., of the particular vehicles; or according to the seating capacity, or in proportion to the extent of their use on highways."

If an Act of the Legislature or an ordinance of a municipality provided a license fee of \$2.50 for each vehicle drawn by one horse and \$5.00 for each vehicle drawn by two horses, and if John Doe applied for and was issued a license for and at the price of \$2.50 to operate a vehicle drawn by one horse, he could not thereafter and during the license year engage in the operation of a second vehicle drawn by one horse without being liable to the additional license required therefor, and neither could he change his equipment so

that the vehicle for which he had obtained a license to be drawn by one horse would later during the license year be drawn by two horses and escape payment of the additional license fee provided for each vehicle drawn by two horses.

Likewise, if the law requires of a person operating certain vehicles for hire, that he pay \$4.00 for each vehicle used for hire and he takes out and pays for a license to operate twenty such vehicles for hire, if at any time during the license year he sees fit to add another such vehicle, he would certainly be required to pay an additional \$4.00 for the operation of said additional vehicle.

To say that a milk distributor, who ordinarily handles less than 500 gallons of milk daily and who has taken out a license as required by the Act herein under consideration, which license entitled said distributor to handle more than 100 gallons of milk per day but less than 500 gallons per day, might be permitted at some time during the year to handle in excess of 500 gallons per day, or that he might for one day, one week or one month handle in excess of 500 gallons per day without being required to pay a license fee in the higher classification would tear down the provision of said Act which fixes the amount of the license fee and would be tantamount to saying that he might handle in excess of 500 gallons per day for eleven (11) months and thirty (30) days without being required to pay a license fee in the higher classification. In other words, it was necessary that a definite maximum limitation be established, beyond which a distributor could not go and not be liable for an additional or different license fee, and the regulation in this regard appears to be quite reasonable.

Section 23 of said Act on page 219 provides as follows:

"VIOLATION, PENALTIES: Any person violating any provision of this Act or any lawful order, rule or regulation of the Board shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than Five Hundred Dollars (\$500.00). Each day's violation of any such provision, order or regulation shall constitute a separate offense."

In my opinion, the above provision clearly portrays a legislative intent that, if a milk dealer applies for and is issued a license to handle more than 100 gallons of milk per day but less than 500 gallons per day, the first day during that license year in which he handles in excess of 500 gallons of milk he is guilty of violating a provision of this Act, and is, therefore, subject to the penalty above provided.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

October 31, 1938.

Hon. W. T. Kelley,  
Tax Assessor and  
Secretary, Board of Review,  
Jasper, Alabama.

Chairman of Board of Revenue of Walker County is a member of the Board of Revenue of said County, charged with the performance of the duties required of members of the Board of Review, as provided in Section 67 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your inquiry, requesting my opinion as follows:

"A Local Act was passed and approved on July 31, 1935 to abolish the County Commission of Walker County and to create the Board of Revenue instead (Local Acts of 1935, p. 131).

"This Act provides for four associate members and a Chairman.

"Is there anything in this Act that relieves or excuses the Chairman from performing duty as a member of the Board of Review, as provided in Section 67 of the Revenue Act of 1935?"

In my opinion, your inquiry should be answered in the negative.

Section 67 of the Revenue Act of 1935 provides, in part, as follows:

"Members of the Courts of County Commissioners or Boards of Revenue, other than the Judge of Probate, of the several counties of the State, together with the Tax Assessor of such counties are hereby constituted a Board of Review \* \* \*."

Section 2 of the Act of the Legislature creating the Board of Revenue of Walker County (Local Acts of Alabama 1935, page 131), provides as follows:

"Section 2. That the said Board of Revenue shall consist of five members, one of whom shall be Chairman of said Board of Revenue."

Further, that part of Section 8 of the Local Act which is pertinent to your inquiry, and Section 10 of said Act, provide:

"Section 8. \* \* \* Nothing herein shall be construed to relieve any member of said Board (Board of Revenue) from any duty or obligation now or which may hereafter be imposed by law upon him or upon said Board of Revenue."

"Section 10. That the Board of Revenue and its members shall have and exercise all the jurisdiction, rights, powers and authority and shall perform all the duties and services which are now or may hereafter be vested in or placed upon Courts of County Commissioners, Board of Revenue, or like governing bodies or courts of like kind by the general laws of Alabama."

Attention is directed to the fact that the above-quoted excerpt from the 1935 Revenue Act constitutes **all** members of Courts of County Commissioners or Boards of Revenue members of the Board of Review of the several counties. It provided that the **Probate Judge** shall not be a member of such Board of Review. By the provisions of Section 2 of the Local Act creating the Board of Revenue of Walker County, as above quoted, the Chairman of said Board is made a member thereof; and, the quoted excerpts from Sections 8 and 10 of said Act impose upon the members of the Board of Revenue the duties theretofore imposed by law upon Courts of County Commissioners.

In view of the above, I do not think there could be any question but that the Chairman of the Board of Revenue of Walker County is a member of the Board of Review and should perform the duties imposed upon him as such by Section 67 of the Revenue Act of 1935.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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October 31, 1938.

Hon. E. C. Whelan,  
License Inspector,  
Jefferson County,  
Birmingham, Alabama.

License tax: Schedule 42 of Section 348 of 1935 Revenue Act, not applicable to licensed Real Estate Company developing its own property for sale, although development thereof is in accord with plans and specifications of prospective purchasers.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your inquiry as follows:

"The Shepherd-Sloss Realty Company of Birmingham paid a license to do a real estate business. They are also real estate developers. They own several subdivisions in this county and will sell the lots with a house built according to the prospective purchaser's plans and specifications. Or in some instances, they will have a building under construction according to their own plans and specifications, and before the building is completed, they will change the plans and specifications to

suit the prospective purchaser. Would they be due a license under Schedule 42 of 1935 Revenue Acts?

"I might state further they have their own foreman and pay the labor, buy the material and do their own financing. In other words, they will sell their lots with a house built according to their specifications, which is known as a Lock and Key job."

The pertinent provisions of Schedule 42 (General Acts, 1935, page 455) are quoted as follows:

"Schedule 42. CONSTRUCTION COMPANIES OR CONTRACTORS. —Any person, firm or corporation accepting orders or contracts for doing any work on or in any building or structure, requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead, electric wiring, or other steel, or any other building material, or shall accept contracts to do any paving or curbing on sidewalks or streets, public or private property, using asphalt, brick, stone, cement, wood or other composition, or who shall accept an order for or contract to excavate earth, rock or other material for foundations or any other purpose, or who shall accept an order or contract to construct any sewer of stone, brick, terra cotta, or other material or shall accept a contract to construct highways, bridges, dams or railroads, shall be deemed a contractor."

In the construction of license tax laws, the Supreme Court of Alabama has held that such laws must be construed most favorably to the taxpayer; that they must be confined to the strict letter of their language, and that their application cannot be enlarged by implication or inference; and, that they must be such as to show a plain intent that a particular business comes within their terms. *State v. Dr. Pepper Bottling Co.*, 155 So. 92, 26 Ala. App. 125 (Cert. Den. 155 So. 93, 228 Ala. 607).

The above-cited case is also, in effect, authority for the general proposition that license required for engaging in a principal business authorizes the person so licensed to carry on, without further license, such activities as may constitute integral parts of such principal business.

It is my opinion that the Shepherd-Sloss Realty Company, by improving its own lots by building houses thereon, using its own labor, material, etc., even though the houses so built are constructed in accord with the plans and specifications of prospective purchasers, is acting only in the furtherance of the conduct of its principal business, viz., real estate business; and, that such development of its own properties, in order to enable it to consummate a sale thereof, is but an integral part of its said principal business, and does not bring it within the terms of Schedule 42 of the 1935 Revenue Act. Therefore, the Shepherd-Sloss Realty Company is not due a license under said Schedule 42.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

November 1, 1938.

Hon. J. H. Sims,  
Judge of Probate,  
Bullock County,  
Union Springs, Alabama.

Deed Tax — Quit-claim deed given in lieu of an original warranty deed which has been lost and was never placed on record, held subject to deed tax, as required by General Acts 1935, page 456.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter under date of September 15, 1938, in which you request my opinion as follows:

"I am enclosing herewith copy of a deed from J. F. Hitchcock, Et. Al., to Alpha Whittington and I would thank you to advise me whether a deed tax is due upon the same.

"You will note that the same is a quit-claim deed, without present consideration, given to replace a deed, which was executed several years ago, was not placed on record and was lost, all of which facts appear on the face of the deed.

"Mrs. Whittington insists that the legal title passed under the original deed and that this deed is given merely to correct the record, and hence falls within the exception of the Statute.

"Will you kindly advise?"

You enclose a copy of a deed, the pertinent provisions of which are:

"STATE OF ALABAMA }  
BULLOCK COUNTY }

"KNOW ALL MEN BY THESE PRESENTS: That we M. H. Hitchcock and Mattie Hitchcock, his wife, Berta Hitchcock Colley and J. O. Colley, her husband, J. F. Hitchcock and Sallie Hitchcock, his wife, in consideration of the sum of \$1.00 to us in hand paid by Alpha Whittington, the receipt whereof is hereby acknowledged, we do remise, release, quit-claim and convey to the said Alpha Whittington all our right, title, interest and claim to the following described real estate in Bullock County, Alabama, to-wit:

"N $\frac{1}{2}$  of the SE $\frac{1}{4}$ , Sec. 17, Fractions A, B, C and D in the S $\frac{1}{2}$  of Sec. 17, all of lot 12 lying east of Pea River containing 21 acres, more or less, and being a part of the SW $\frac{1}{4}$  of Sec. 17, all in Twp. 12, Range 25, containing 308 acres, more or less.



"And we do hereby declare and make known that the true cause for this deed is a deed executed by the grantors herein to the grantees on February 14, 1935, conveying the above described real estate, which said deed has been lost or destroyed and is not on record and this deed is made in lieu thereof and to clarify the record title.

"To have and to hold to the said Alpha Whittington, her heirs and assigns forever.

"Given under our hands and seals this the 2nd day of September, 1938."

In my judgment, the deed here considered, when offered for record, is subject to the deed tax. It is true that the deed recites that "the true cause for this deed is a deed executed by the grantors herein to the grantees on February 14, 1935, conveying the above described real estate, which deed is made in lieu thereof \* \* \* \*."

The exception relied upon here is found in the General Acts of 1935, page 456, as follows:

"No deed, bill of sale or other instrument of like character which conveys any real or personal property within this state, or which conveys any interest in any such property except the transfer of mortgages on real or personal property within this states upon which the mortgage tax has been paid, deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate \* \* \* \*."

In my judgment, the deed here considered does not fall within the meaning or the letter of the above-quoted law.

It is admitted that a warranty deed conveying all right, title and interest of the former owner to the persons now presenting a quit-claim deed for record, has been previously given, has been lost and now a quit-claim deed is being given; not to perfect a defect in title but to convey to the purchaser by a different type deed all right, title and interest which was originally conveyed under a warranty deed.

The recitation is clear. The quit-claim deed recites that it is being given in lieu of the warranty deed. It is not necessary to look beyond the terms of the instrument itself to find the clear and admitted intention of the parties, namely, that the warranty deed be of no effect, and that the quit-claim deed now executed be given in lieu of or instead of the warranty deed formerly given.

This is not only not a strained interpretation of the words "in lieu of" but is the logical and legal interpretation given these words by the courts.

See Words and Phrases, First Series, Volume 4, page 3475.

There can be no logical contention that if the original warranty deed here mentioned, had been offered for record, that the deed tax would not be due.

It must, therefore, follow that the quit-claim deed here offered as a substitute for, as is admitted, "in lieu of" the former warranty deed, cannot be a perfection of legal title but is a passing or conveying of legal title, if the prior warranty deed did in fact convey legal title. The present quit-claim deed than can serve only one purpose, namely, to convey the right, title and interest of the original seller by a deed of a different character, and replacing the original conveyance becomes a deed of original conveyance. It is, therefore, subject to the deed tax as provided by law quoted, *supra*.

I wish to further refer you to the case of *Hawkins v. Pure Oil Co.*, 232 Ala. 660.

In my judgment, the deed quoted by you in your request is not such a deed as would fall within the spirit or the letter of the exception found in General Acts, 1935, and quoted *supra*. The premises considered, it is my opinion that the deed presented by you for consideration requires the payment of a deed tax when the same is offered for record, as required by the General Acts of 1935, page 456, quoted *supra*.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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November 2, 1938.

Hon. C. W. Gantt,  
Clerk of the Inferior Court of Elmore County,  
Wetumpka, Alabama.

Carrying concealed weapons — Section 5, General Acts, 1936, page 51, is a pro tanto repeal of Section 3485 of the Code of 1923, so that one not licensed to carry a concealed pistol may, nevertheless, carry such a weapon in that manner at his fixed place of abode without running afoul of any provision of criminal law.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have you request for opinion as follows:

"Under the law creating the Inferior Court of Elmore County, Alabama, it becomes my duty and responsibility in a good many cases to prepare complaint or affidavits for the beginning of cases in the said court. (See Local Acts 1935, page 24, Section 12.) I now have for consideration a case wherein the facts are as follows: A person was found by officers in the yard of his residence, where a party was in progress, with a pistol concealed about his person, and he did not have any license to carry a pistol. The question I desire you to advise me on is whether or not he has violated the law and whether under such facts

I should prepare a complaint for the institution of a prosecution against him for violating any law now on the statute books with reference to the carrying of concealed pistols."

In my opinion, a person does not violate any criminal law by carrying a pistol concealed about his person within the curtilage of his place of abode, notwithstanding the fact that he has procured no license to carry such a pistol under the provision of General Acts of 1936, page 51."

It is true that under Section 3485 of the Code of 1923, no distinction is made between one carrying a pistol concealed about his person at his own place of abode and one so bearing such weapon on the premises of another or in a public place. **Harman v. State**, 69 Ala. 248; **Dunston v State**, 124 Ala. 89.

But in my opinion, Section 3485 of the Code of 1923 was amended pro tanto by Section 5 of the 1936 Act, supra. It provides:

"Section 5. CARRYING PISTOL: No person shall carry a pistol in any vehicle or concealed on or about his person, except in his place of abode or fixed place of business, without a license therefor as hereinafter provided."

Other provisions of the 1936 Act, supra, provide for the application of a person desiring to carry a pistol concealed about his person to the authority therein designated for a license to so carry such a weapon. Any person carrying such a weapon after due license has been obtained therefor, is not guilty of the offense denounced by Section 3485 of the Code of 1923. This license, by virtue of the specific exception in Section 5, quoted supra, extends no right to the licensee while he is carrying a pistol concealed about his person in his place of abode. Unless the legislature, by the enactment of the exception contained in Section 5 as to carrying a concealed pistol in one's place of abode or fixed place of business, intended to thereby repeal, pro tanto, Section 3485 of the Code of 1923, it stands convicted of providing for an anomalous situation.

I reiterate that under Section 5, supra, the license affords no protection from prosecution to one who carries a pistol concealed about his person at his fixed place of abode for the very obvious reason that the license is not operative upon such circumstances. If Section 5 is not a pro tanto repeal of Section 3485, a licensee may carry a pistol concealed about his person upon the premises of others and in all public places, without violating the law; but if he carries such weapon in such manner in his fixed place of abode, he is guilty of an offense against the law. This is so farfetched that I think that it clearly demonstrates that the legislature intended by the exception contained in Section 5, to abrogate the rule theretofore laid down by the courts, that one who carries a pistol concealed about his person, even at his fixed place of abode, is guilty of the offense denounced by Section 3485.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

November 4, 1938.

Hon. Chas. W. Lee,  
State Comptroller,  
Capitol.

Counties — The Uniform Accounting and Reporting Act (General Acts, 1935, p. 43) requires that a record of purchases made by the county should be kept in the manner provided by said Act.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"Under date of June 14th, 1938, (Quarterly Report Vol. XI, page 91) you rendered an opinion to Hon. W. L. Pratt, Judge of Probate, Centreville, Alabama, in which you held in answer to his fifth question as follows:

"Question: 'Should all supplies purchased for the Road Department be made by requisition and purchase order?'

"Answer: 'In answer to your fifth inquiry, I can find no law which requires that supplies purchased for the road department be made by requisition and purchase order. It is my opinion pursuant to Section 6755 Code of Alabama 1923, that Courts of County Commissioners may make such rules and regulations as they deem proper for the purchase of necessary supplies for the County.'

"Acting under the Uniform Accounting and Reporting Act (Acts 1935, pages 43-44) requisitions and purchase orders for all credit purchases were duly prescribed and adopted as a part of the system to be used by a County Governing Body relative to all funds of the County. Recommendations and explanation as to the use of requisition and purchase orders is hereto attached. In view of the above, will you please advise me as follows:

"1. Should a requisition and purchase order be made and duly entered for supplies purchased for every department, regardless of the fund from which same is to be paid?"

The Uniform Accounting and Reporting Act (General Acts, 1935, p. 43), Section 1 thereof, provides as follows:

"Section 1. That the State Comptroller, with the approval of the State Auditor and Chief Examiner of Accounts, is hereby required to prepare as soon as practicable after the passage and approval of this Act such forms of bookkeeping and accounting books, records, reports, and other blank forms as may be necessary for the installation of a uniform system of accounting and reporting in and for the County of-

lices of this State wherein the officers thereof are charged with any duties of receiving and disbursing public funds or other funds, and to transmit to such officers copies of such forms. The State Comptroller, with the approval of the State Auditor and the Chief Examiner of Accounts, may change or alter such forms from time to time as appears advisable to the State Auditor and the Chief Examiner of Accounts, having due regard in making such change, or changes, to the expense necessary in discarding the forms already on hand, and the use of forms as then prepared and required under this Act."

I have examined the forms annexed to your letter, which you advise me you have prepared under the Uniform Accounting and Reporting Act, *supra*, and which, as you state, have been approved by the State Auditor and Chief Examiner of Accounts. Form No. 1 is a purchase requisition to be used by the officer or employee of the county who is in need of supplies for his office or department. Form No. 2 is a purchase order to be signed by the proper officer. The purpose of the Uniform Accounting and Reporting Act was to make the bookkeeping uniform in each county of the state so that an audit of the books could be made more easily by the Comptroller. This does not affect the manner in which purchases are to be made. The authority to purchase supplies for every department is vested in the county governing body. The requirement added by the Uniform Accounting and Reporting Act is that, at some time, either before or after a purchase is authorized by the county governing body, a requisition for that purchase be made and that an entry of the purchase be made by the officer or employee designated by the county governing body to do so. Therefore, your question should be answered in the affirmative, that is, a requisition order and an entry of the purchase should be made and duly entered for supplies purchased for every department. This requirement, however, will not affect the validity of any claims against the county. (See opinion to Hon. Daniel T. McCall, August 20, 1938, now in MS.) As stated before, the purpose of the act was merely to effect a uniform system of bookkeeping. It was not to direct the manner in which purchases were to be made by the county governing body.

This opinion is in explanation of and enlargement upon an opinion of this office found in Quarterly Reports of Attorney General, Vol. XI, p. 91.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

November 4, 1938.

Hon. Roy Johnson,  
Tax Assessor,  
Jefferson County,  
Birmingham, Alabama.

Jefferson County — Compensation of County Tax Assessor for services in connection with assessing county school taxes and district school taxes—

Under Section 22 of the Revenue Act of 1935, read in connection with the complementary provisions of Section 161 thereof, the Tax Assessor of Jefferson County is entitled to retain the sum of \$1,000 paid over to him by the Tax Collector for his services in connection with the assessment of county school taxes and district school taxes, notwithstanding Local Acts 1933, page 14, Local Acts 1933, page 43, and Section 159 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Under Sec. 22, Act 1935, page 256, I would like to ask your opinion as to whether or not under the last eight lines of this section of the Revenue Bill the tax assessor of Jefferson County is entitled to receive and to retain personally the \$1000 in lieu of compensation for assessing the three mill county school tax and the three mill district school tax."

In my opinion the Tax Assessor of Jefferson County is entitled to retain the \$1,000 mentioned in the statute referred to, and is not required to pay the same into the County Treasury.

Under the Second Amendment to the Constitution, the Legislature is fully empower to fix, regulate and alter the fees commissions, allowances and salaries of the county officers of Jefferson County, from time to time.

Pursuant to that grant of authority, the Legislature fixed the salary of the Tax Assessor of Jefferson County at \$4,800 per annum, and provided that the same should be in lieu of all other compensation, fees or emoluments. Local Acts 1933, page 43. At the same session, the Legislature enacted (Acts 1933, page 14) a provision that "all fees which may be collected for the performance of any official service by any officer of Jefferson County, Alabama, who is compensated for his services by salary, shall as soon as collected, be paid into the County Treasury to the credit of the general fund of the county, except such fees as may now, by law, be required to be paid in the State Treasury."

Section 159 of the Revenue Act of 1935 (Acts 1935, page 256) provides:

"Section 159. In all counties where county officials are paid on a salary instead of a fee basis, all fees allowed under the terms of this Act to be paid to or collected by county officials, shall, by said officials be paid into the county treasury, or to such officials performing the duties of County Treasurer."

However, in Section 22 of the Revenue Act of 1935, which fixed the schedule of commissions for tax assessors, is this provision:

"In counties of more than 150,000 population, according to the last Federal census or any subsequent Federal census, no fees or commissions shall be allowed for assessing the three mill county school tax, and the three mill district school tax, but in lieu thereof the tax assessor

in such counties shall be paid by the collector of such county the sum of one thousand dollars, which is provided by law to be retained by the collector of such county the sum of one thousand dollars, which is provided by law to be retained by the tax collector for the tax assessor."

That provision is complemented by a like provision, as to tax collectors, in Section 161 of the Revenue Act of 1935, which fixes the schedule of commissions for tax collectors. It provides:

"In counties of more than 150,000 population according to the last Federal census or any subsequent Federal census, no fees or commissions shall be allowed for collecting the three mill county school tax and the three mill district school tax, but in lieu thereof the tax collector of such counties shall retain the sum of Two thousand dollars per annum, one thousand dollars of which shall be paid by the collector to the tax assessor for his services rendered in assessing and collecting such taxes, **which said amount shall not be paid by the said collector into the general funds of the county**, and said collector may retain such amount out of the three mill county school tax when he makes payment to the treasurer of the county school board. \* \* \* "

The provisions next above are the last expressions of the Legislature upon the subject. The two Local Acts of 1933, cited supra, had fixed the salary of the tax assessor, had provided that it should be in lieu of all other forms of compensation, and had provided that all county officers of Jefferson County who were compensated for their official services by salary, should pay into the county treasury to the credit of the general fund all fees which they collected for any official services. Section 159 of the Revenue Act of 1935 provided that fees collected by officers whose compensation was fixed at a stipulated salary should be paid into the county treasury or into the State Treasury, as the case may be. However, the quoted provisions of Sections 22 and 161 of the Revenue Act of 1935 indicate a clear legislative intention to compensate the Tax Assessor and Tax Collector of Jefferson County in the sum of \$1,000 each, in addition to their respective salaries, for their services in connection with the assessing and collecting of county school taxes and district school taxes. The provisions of Sections 22 and 161, supra, have the effect of amending, pro tanto, the two Local Acts of 1933, cited supra, to effect that end.

Cf *Hawkins v. Jefferson County*, 233 Ala. 49.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

Hon. A. H. Collins,  
Superintendent of Education,  
Montgomery, Alabama.

November 4, 1938.

1. Special school tax, authorized under Eighth Amendment to the Constitution of the State of Alabama, collected by municipality

in which there is no city school board, should be paid over to County's Custodian of Public School Funds.

2. Town Treasurer has no right to hold special school tax, authorized under Eighth Amendment to the Constitution of the State of Alabama collected by municipality, or to expend the same at the direction of the town council.

3. Special school tax, authorized by the Eighth Amendment to the Constitution of the State of Alabama, must be levied for that particular purpose, and must be used for that purpose.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of September 28, 1938, requesting my opinion as follows:

"This is to request your opinion on certain questions concerning the five-mill special school tax of the municipalities of Carrollton, Aliceville, Gordo and Reform authorized under the Eighth Amendment to the Constitution of the State of Alabama as proposed in 1919 and ratified January 13, 1920.

"1. Should the proceeds of this tax be turned over to the County Custodian of Public School Funds in counties in which towns are levying this special tax and in which there are no city school systems?

"2. Does the town treasurer have the right to hold this special school tax and expend it at the direction of the town council?

"3. Has the municipality or the county board of education the authority to sell school tax warrants against this special tax?"

1. In my opinion your first inquiry should be answered in the affirmative.

A municipality levying a tax for school purposes under authority of the Eighth Amendment to the Constitution of the State of Alabama, levies and collects the same as an agent of the State; and, if such public school funds are disbursed by any municipal authority, that authority in so disbursing the same would be acting as a State agent. (*Hamilton et al. v. Pullman Car & Mfg. Corporation*, 163 So. 329, 321 Ala. 7)

However, a City Board of Education is the only municipal agency vested with authority for control, administration and supervision of public schools. A City Board of Education may exist only in municipalities of twenty-five hundred or more inhabitants; and, where no City Board of Education does exist in a particular municipality the County Board of Education is vested with authority for control, administration and supervision of the public schools therein. (Alabama School Code of 1927, Sections 86 and 188). The disbursement of school revenues must be made by the Board having the



control, administration and supervision over the school system; and, in a case where a municipality, having no City School Board, levies and collects a special school tax under authority of the Eighth Amendment to the Constitution of the State of Alabama, such tax, in my opinion, should be turned over to the County Custodian of public school funds to be expended upon the order and under the direction of the County School Board for the benefit of the City School System.

2. Answering your second inquiry, I know of no law which would authorize a Town Treasurer to hold special school tax levied and collected under authority of the Eighth Amendment to the Constitution of the State of Alabama, and to expend the same at the direction of the Town Council.

3. As to your third inquiry, I am unable to give you a definite answer, as a special school tax levied and collected under authority of the Eighth Amendment to the Constitution of Alabama could be used only for the purpose or purposes for which it was authorized; and, unless school tax warrants were issued for the purpose of realizing funds to be expended for the purposes for which the special school tax was levied and collected, then, there would be no authority to sell school tax warrants against this special tax.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

November 4, 1938.

Hon. John T. Gaillard,  
Member, Board of Revenue,  
Conecuh County,  
Evergreen, Alabama.

Gasoline Tax Fund—

1. Contract for the purchase of road machinery providing for payment out of the Gasoline Tax Fund over a period of twenty-four months does not infringe any constitutional provisions, even though the county may be over its constitutional debt limit.

2. The Chairman of Board of Revenue of Conecuh County should sign a contract for purchase of road machinery which is legal and valid and which has been authorized by a majority of the members of the Board of Revenue.

3. If the Chairman refuses to sign said contract or purchase order, he may be compelled to do so by appropriate legal action.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of August 16, 1938, which reads as follows:

"The Board of Revenue of Conecuh County, of which I am a member was created by Act No. 324, Local Acts, 1927, page 241, approved August 27, 1927. This Act has been twice amended: First, by Act No. 105, Local Acts, 1931, page 31, approved March 6, 1931; and second, by Act No. 97, Local Acts, 1932, page 42, approved October 19, 1932.

"At a recent meeting of the Board, a resolution or order, a copy of which is hereto attached, as shown by the minutes of said meeting was adopted. Three members of said Board voted in favor of the passage or adoption of said resolution or order. One member and the chairman did not vote on the passage or adoption of said resolution or order. Declining to vote for or against the same. After the passage or adoption of the resolution or order, it was presented to the chairman of the Board for his signature and he refused to sign the same, giving as his reason the fact that the county was over its constitutional debt limit.

"Please refer to the above-cited Local Acts and any other pertinent provisions of our Constitution and statutory laws and advise me on the following questions concerning this resolution or order:

"1. Does the resolution or order as passed constitute a valid and legal obligation against the proceeds of the State Gasoline Tax Fund to be received by Conecuh County?

"2. Should the chairman sign said resolution or order?

"3. If the chairman persists in his refusal in signing said order, is the order valid and legal, and are the parties concerned, that is, the Commissioners Court of Conecuh County and the Road Machinery Company, authorized to act in accordance therewith without his signature?"

I have also examined the certified copy of the minutes of the Board of Revenue at its August 11, 1938, meeting in regard to the purchase of certain road machinery and a copy of the contract for purchase of this machinery which have been furnished me.

The contract is by and between Conecuh County, as the purchaser, and Ray-Ewbank Machinery Company, Montgomery, Alabama, as the seller, and calls for the sale by the Ray-Ewbank Machinery Company to Conecuh County of one International tractor, more particularly described in the contract, for \$4,350.00. It further provides that the county is to be allowed \$1,250.00 for a tractor which it now has and which it agrees to turn in to the Ray-Ewbank Machinery Company as the down payment on the tractor which that company is to sell to the county. It further calls for the payment of the balance due on the machinery in twenty-four equal monthly installments with interest at 6% per annum, both principal and interest to be paid from the Gasoline Tax Fund of the county. The contract is signed by three of the members of the Board of Revenue of Conecuh County. The minutes of the August 11, 1938, meeting show that a motion was put before the Board to ratify this contract for purchase of this tractor and that three of the members of the Board voted in favor of the motion and that one of the members did not vote. Three voting in favor of the motion constituted a majority of the members of the Board. The minutes further show that the Chairman, for reasons which he stated at the time, refused to sign the contract or order of purchase.

The Board of Revenue of your county has the authority to purchase road machinery to be paid for out of the proceeds of the State Gasoline Tax to be received by your county, notwithstanding the fact that your county may have already exceeded its constitutional debt limit. Such a debt, that is, a debt to be paid solely from the Gasoline Tax Fund and which is not backed by the full faith and credit of the county, does not constitute a debt of the county within the meaning of any constitutional or statutory limitations. See *In Re: Opinion of the Justices*, 230 Ala. 673; *Lyon v. Shelby County*, 235 Ala. 69; *Herbert v. Perry*, 235 Ala. 71; *Isbell v. Shelby County et al*, 235 Ala. 571. Therefore, the resolution or order passed by your Board of Revenue for the purchase of this road machinery, when properly signed, constitutes a valid and legal obligation against the proceeds of the State Gasoline Tax to be received by Conecuh County.

The Board of Revenue of Conecuh County was created by Act No. 324, Local Acts in both the 1931 and 1932 Sessions of the Legislature but in respects not here material. Section 3 of the 1937 Act creating your Board, dealing with the power and authority of said Board, provides in part:

"To have the right and authority to bind the county in any contract for the payment of money."

Sections 4, 5 and 6 of said Act read as follows:

"Section 4. That the said Board of Revenue shall have all jurisdiction and powers that are now or may be hereafter by law vested in Courts of County Commissioners of this State, and by any special law now vested in the County Commissioners of Conecuh County; and the several members of the said Board of Revenue shall perform all the duties and services and exercise all the powers that are or may be required by law of the several members of the Court of County Commissioners.

"Section 5. That all general laws hereinafter enacted in relation to the jurisdiction, powers, authority or duties of the County Commissioners shall apply to and govern the Board of Revenue of Conecuh County.

"Section 6. That the Chairman of the said Board of Revenue shall be its presiding officer, and shall sign the minutes of the proceedings of said Board, and shall have the same power and authority as the other members in passing on all questions, and shall sign all warrants drawn on the County Treasury, or County Depository, and all orders for the payment and disbursement of funds of the County, and sign all contracts entered into by the Board of Revenue of Conecuh County. It shall be the duty of said Chairman to prepare business and obtain information for the sessions of the Board of Revenue and see that all orders thereof are properly executed. He shall exercise all the duties required of the Probate Judge as to matters coming before the County Commissioners."

It seems very clear from the above-quoted provisions of this act that your Board of Revenue has the power and authority to enter into such a contract as the one now under consideration. By the provisions of Section 6, supra, the chairman of your Board is given only the same power and authority in passing on questions before the Board as are the other members

of the Board, and by the provisions of the same section he is required to sign all contracts entered into by the Board of Revenue of your county. This certainly does not mean that he has the authority or power by his refusal to sign an order or contract which has been passed by a majority of the members of your Board to veto the action of the majority of the Board. On the contrary, when an order or contract has been passed by a majority of the members of your Board, it is the duty of the chairman to sign the contract or order. I have held hereinabove that the contract or order in the instant case is free from constitutional objection and that it will constitute a legal and valid obligation against the proceeds of the State Gasoline Tax to be received by Conecuh County when properly executed. Therefore, it is my opinion that the chairman of your Board should forthwith sign this order or contract for purchase of this road machinery.

If your chairman refuses to sign said contract or order, appropriate legal steps may be taken to compel him to perform this ministerial duty required of him by law.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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November 4, 1938.

Hon. O. L. Andrews, Clerk,  
Circuit Court, Tenth Judicial Circuit,  
Birmingham, Alabama.

Under Section 7278, Code of Alabama, 1923, the clerk is entitled to pay for each summons and complaint issued by him and is also entitled to pay for each copy of same. The clerk is also entitled to pay for filing and issuing copies of the Interrogatories and this is true regardless of whether copies of summons and complaints or Interrogatories are furnished at the time of filing same or not.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 12, 1938, in which you request my opinion as follows:

"We had an attorney to object to a certain charge made on a cost bill. It was for the second and third items listed under Sec. 7278—Fees Allowed Clerks of Circuit Courts. We charged \$1.25 for issuing the summons and complaint and 75c for making copy thereof. He contends that as long as he furnishes this office with a copy of the summons and complaint, in addition to the original, we should not charge him with making that copy, as he, and not we, did the actual work. In cases where these carbon copies of summons and complaints are furnished by the attorneys, should we make this charge? This question came up when the Plaintiff

had to pay the Court costs. Would the same rule also apply where the attorneys furnish copies of Interrogatories? We wish your official opinion on the above."

Section 7278, Code of Alabama, 1923, fixes the fees and compensations of the clerks of the Circuit Courts and states among other things:

"Issuing summons and complaints ..... \$1.25

Making every copy thereof ..... .30

Making every copy thereof, over 200 words, for each hundred words .15"

This simply means it is your duty to issue, that is, sign your name as clerk to each summons and complaint and when the case demands, it is your duty to make the copies and in so doing, you are entitled to the fees prescribed above. If an attorney when filing his complaint furnishes you with the copy or copies of the complaint, he may do so (and many do) and this is all right. Lawyers often do this to be sure it is a correct copy of the original complaint, but when these summons and copies go out from your office, you are entitled to the fees set out above and this applies to Interrogatories and copies of Interrogatories as well as to summons and complaints and copies thereof.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

November 7, 1938.

Board of Revenue,  
Tuscaloosa County,  
Tuscaloosa, Alabama.

Tuscaloosa County—Authority of the county governing body to equip office of the Sheriff.

Under Local Acts of 1936, page 53, the county governing body may provide city directories of the cities within the county, for the use of the office of the Sheriff.

Opinion by Assistant Attorney General Rowe.

Gentlemen:

I have your request for opinion as follows:

"State Examiners McDermott and Sims called our attention to an expenditure of \$15.00 for a city directory which we use in the Sheriff's

office and also the Circuit Clerk's office. The Examiners based their objection to this bill on an opinion rendered by A. A. Carmichael in 1936, page 315 Quarterly Report of the Attorney General, Volume 2. We purchased this directory after having received an opinion from our county attorneys as follows:

"As you know, the Sheriff of Tuscaloosa County was placed on a salary basis by Special Act of the Legislature, Acts of 1936, Page 53, Section 9 of said Act reads as follows: "The Board of Revenue of said county shall also cause to be paid out of the County Treasury all other costs and expenses of operation of the office of Sheriff, equipment and furnishings and also includes motor fuel for the operation of automobiles or other vehicles operated in the official business of the Sheriff's office." We think that this section is broad enough to authorize the county to pay for a city directory to be used by the Sheriff as a part of his office supplies and equipment and that the Attorney General's opinion rendered the Sheriff of Colbert County does not apply to Tuscaloosa County."

"The question is did our county attorneys give us the proper interpretation?"

In my opinion, the local act of 1936, approved April 17, 1936, (Local Acts 1936, page 53) affords sample authority for the Board of Revenue to purchase city directories of the cities within the county, for the use of the Sheriff of Tuscaloosa County.

The question to which the former opinion of this office, appearing in Quarterly Report of Attorney General, Vol. II, page 314, is addressed had to do with the authority of the county governing body of Colbert County to procure a city directory for the office of the solicitor. There was no local or general law which either expressly or impliedly authorized such a purchase. That opinion represents the studied judgment of this office upon the question there dealt with.

However, the Local Act of 1936, cited supra, pertaining to the office of the Sheriff of Tuscaloosa County, encompasses broader provisions than are found in the general statutes upon that subject. In my opinion, when consideration is given to all the provisions of the Local Act, one must conclude that it authorizes the purchase of city directories of the cities within the county for the use of the office of the Sheriff.

The Local Act has been given a very liberal construction by the Supreme Court in the recent case of **Tuscaloosa County v. Shamblin**, 233 Ala. 6. The question there was whether the county could provide motor transportation for the official use of the Sheriff and his deputies. The Court said:

"It is not here contended by or for the sheriff that as thus enacted the county should place in his hands each year any sum to be so used, but that it and other features of the act should be so construed as to require the county to furnish such equipment as automobiles and pay for their maintenance. It is certainly inoperative in so far as an amount must be thus appropriated and paid to the sheriff for that purpose; and no contention to the contrary is here made. But it shows a purpose to include such equipment as a part of the expense of operating the office

provided for in general terms in section 9 of the act, in line with the idea that the present day administration of the sheriff's office requires its use. (Citing cases)

"As it remains, the act does not give the unrestricted power to the sheriff to buy such equipment, and force the county to pay for it. But we think it means that the county must provide such equipment, exercising the judgment of its governing board in respect to the details in cooperation with that of the sheriff."

It is to be noted that the Local Act, *supra*, does not purport to broaden or extend the provisions of law appertaining to the office of the Clerk of the Circuit Court of the county. For that reason, I think that the question of the authority of the county governing body to procure such directory for the office of the Clerk of the Circuit Court is governed by the former opinion appearing in Quarterly Report of Attorney General, Vol. II, page 314, cited *supra*. Cf. *Mobile County v. Williams*, 180 Ala. 539.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

November 9, 1938.

Hon. Joe Patton,  
Tax Collector,  
Sumter County,  
Livingston, Alabama.

Taxation—Benevolent Societies—

A building owned by a subordinate lodge of the Ancient Free and Accepted Masons of Alabama in which a part of said building is used for the purpose of lodge and the remaining part of said building rented for income, is exempted from taxation provided that the owners of said property claim the right to such exemption with each annual assessment of said building.

Opinion by Assistant Attorney General Farnell.

Dear Sir:

Reference is made to your letter of October 24, 1938, which I quote as follows:

"Tonic Lodge No. 707 A. F. & A. M. of York, Alabama, own a two story building, the upper part of which is used and occupied by the Lodge only, the lower story is being used by Alley Blann Hardware Company for a mercantile business and pays to the Masonic Lodge a monthly or annual rent for same. We have always had this property assessed and they have

paid the tax on it, however they have been informed not to assess and pay this tax for the reason they are exempt from tax on it, and refer us to a case that was brought up from Tallapoosa County by Ware Lodge No. 435 vs. J. H. Harper, Tax Collector, which they state is a parallel case. Will you please investigate this and advise me whether or not I shall proceed to force collection on this property at the proper time, or shall I ask for an error on same as being exempt from tax."

It is my opinion that the building referred to in your letter is exempted from taxation. In the case of **Ware Lodge No. 435, et al vs. Harper**, 182 So. 60, the Supreme Court of Alabama held that a building owned by a subordinate lodge of the Ancient Free and Accepted Masons of Alabama which was used partly for lodge purposes and partly for rental purposes was exempted from taxation. I presume from your letter that the Ionic Lodge No. 707 A. F. and A. M. have met all the requirements as set out in the Act of 1875, amendatory of the Act of 1859 (Acts of Alabama 1874-75).

Section 2 of the said Act provides:

"Be it further enacted, That said grand lodge shall have power to collect its revenue and apply the same according to the ancient customs of the order, or may loan out the same for the purpose of aiding in benevolent enterprises or for the purpose of accumulation; Provided, that the money of said grand lodge shall not be loaned upon usurious interest, nor shall the funds or accretions thereof be used otherwise than for the payment of the expenses of said grand lodge and for charitable purposes, and being thus set apart the same shall not be liable to taxation."

Section 5 of the said Act among other things specifically provides as follows:

" \* \* \* and the property and effects owned by them (A. F. and A. M. of Alabama) being dedicated to **charitable purposes only** shall be exempted from taxation."

It is my opinion that the Ionic Lodge No. 707 A. F. and A. M. will not be required to pay taxes on their building referred to in your letter **provided** they claim the right of exemption at the annual assessment of said property. In the case of **State vs. Alabama Educational Foundation**, 163 So. 527, the Supreme Court of Alabama speaking through Mr. Justice Foster said:

"But we think it is clear that the right to such exemption is one which the taxpayer who owns the property must claim with each annual assessment of his property."

In this particular case the Court held that property owned by a School, other than Schools owned or controlled by a religious sect, would not be subject to taxation where the net income from said property was used or was to be used, **exclusively for educational purposes**. The Court held that such property was exempt from taxation, but the owners of such property must claim the right to such exemption at the annual assessment of said property, since the Tax Commission is invested with authority to thereupon determine the right to exemption, subject to judicial review.



It is my opinion that the building owned by the Ionic Lodge No. 707 A. F. and A. M. is exempt from taxation provided the income from said building is used for the general expense of the lodge and charitable purposes, and **provided** further that the owners of said building claim the right of exemption at the annual assessment of said property. Generally, property must be assessed, even though same is exempted from taxation. (Vol. I, Quarterly Report of Attorney General, page 303, and Vol. III, Quarterly Report of Attorney General, page 8).

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

November 9, 1938.

Hon. J. H. Williams, Commissioner,  
Building and Loan Department,  
Capitol.

Building and Loan Associations—

1. Building and Loan Association is authorized to make FHA insured loans but only to applicants who are members of said Association.
2. A person who subscribes for one share or more of stock in a Building and Loan Association, pays any part of the agreed purchase price in cash, and agrees to pay the balance in installments or at some future date, is a member of the Association that sells the stock so purchased.
3. A Building and Loan Association is not authorized to sell FHA insured loans except with the consent of a majority of its Board of Directors and with the approval of the Commissioner. The funds derived from the sale of said FHA insured loans shall be used for the retirement of shares and certificates presented for withdrawal and for no other purposes.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of July 14, 1938, which is as follows:

"There are several Building and Loan Associations under my supervision that have expressed a desire to make F. H. A. loans. There has been some question as to the authority of a Building and Loan Association to make such loans, by reason of the fact that the borrowers of funds of a Building and Loan Association are required to be members of the

Association. The statute does not seem to require any definite amount of stock to be purchased in order to become a member of an Association.

"It is anticipated that Building and Loan Associations making F. H. A. loans would desire to sell some of such loans and there has been some question as to whether or not they would be authorized to sell them.

"Paragraph 8 of Section 9 of the Building and Loan Law (page 221, G. A. of the Legislature of Alabama 1931) provides among other things that no Association shall assign its notes, mortgages or other securities or pledge same for money borrowed except with the consent of the majority of the Board of Directors and with the approval of the Commissioner.

"The same Section provides that the proceeds or funds derived from loans secured by assignment shall be used for retirement of shares and for no other purpose.

"Paragraph 9, Section 9 of the Building and Loan Law (page 221 G. A. of the Legislature of Alabama 1931) provides among other things that Associations shall lend their funds to members only. I have read Senate Bill 4-Simpson, page 11, General Acts of the Legislature of Alabama in Regular Session 1935 and amendments thereto; page 630 of the General Acts of the Legislature of Alabama of the Regular Session 1935; page 77 of the General Acts of the Extraordinary Session of the Legislature of Alabama of 1936 and page 31, General Acts of the Extraordinary Session of the Legislature of Alabama 1936-1937.

"In view of the desire of some of our Building and Loan Associations to make F. H. A. loans, with the expectation of immediate sale of such loans, your opinion is requested as to—

"(1) Is a Building and Loan Association organized under the laws of the State of Alabama, authorized to make F. H. A. loans and to sell such loans to the R. F. C. Mortgage Company, or to any other purchaser without obtaining the consent of a majority of the Board of Directors of such Association and the approval of the Building and Loan Commissioner?

"(2) Is the Building and Loan Association organized under the laws of the State of Alabama authorized to make F. H. A. loans without the applicant first qualifying as a member of such Association?

"(3) What are the legal requirements for a person to become a member of a Building and Loan Association? Is it upon subscribing for a share or shares of stock and paying an installment thereon of say \$2.50 per share or is it necessary that such share or shares be fully paid?

"(4) If a Building and Loan Association is authorized to sell F. H. A. loans would it be legal to use the funds derived therefrom to make other loans or investments, consistent to the Building and Loan business or would it be required to use such funds for retirement of shares and for no other purpose?"

Before specifically answering your inquiries, I wish to quote and discuss the statutes that are pertinent thereto.

Building and Loan Associations in Alabama operate under the provisions of Act No. 159, approved April 9, 1931 (General Acts 1931, p. 218). Section 9 of said Act provides in part as follows:

**"Section 9. POWERS OF BUILDING AND LOAN ASSOCIATIONS.** Associations shall have the following powers: \* \* \* (8) To borrow money, to execute negotiable notes and other evidences of indebtedness. Associations organized under this act, or already in existence, are authorized and empowered to assign their notes, mortgages and other securities for face value, or pledge the same for repayment of money borrowed, provided however, that it shall not be lawful for any association to borrow an amount of money in excess of 25% of its total assets. No association shall assign its notes, mortgages or other securities or pledge the same for money borrowed except with the consent of a majority of its Board of Directors, and with the approval of the Commissioner. Funds derived from the loans secured by assignment or pledge of their securities or notes shall be used for the retirement of shares and certificates presented for withdrawal and for no other purpose. (9) Associations shall lend their funds to members only. Such loans shall be secured by first mortgages on real estate (or 99 years lease-hold interest in real estate) and improvements thereon, or by pledge of the Association's shares or certificates. Additional loans on the same property shall be deemed to be first mortgages for the purpose of such loans. They may take their own shares as additional security and may take other additional security for such loans. All mortgages taken by Associations as security for loans made on real estate shall be recorded forthwith in the office of the proper recording officer of the County in which the real estate security accepted by such Association is located; the mortgage to be kept in the permanent files of the Association subject to the examination of the state examiner until the loan is fully discharged, unless assigned or pledged as hereinabove provided. The funds of the associations, in addition to being loaned on first mortgages, its shares and certificates, may be deposited in any bank under federal or state supervision, may be invested in other associations doing business in the State of Alabama, or in bonds of the State of Alabama, or in municipal bonds or United States government bonds, or in other securities authorized by the laws of Alabama for investment of trust funds. (10) Associations may provide in their by-laws for different rates of interest and premium on different classes of loans, such interest and premium in no case to exceed one per cent per month, and may charge and collect reasonable fees and charges in connection with their loans." (Emphasis supplied).

Certainly it cannot be argued that the above quoted provisions are not applicable to all Building and Loan Associations organized and operating under the 1931 Act, *supra*, regardless of what kind of loans they make unless those limitations or restrictions have been modified by subsequent legislation. The question then presents itself as to whether these limitations or restrictions have been modified by subsequent legislation. On January 1, 1935, there was approved Act No. 10, General Acts 1935, p. 11, which provides as follows:

**"Section 1.** Banks, savings banks, trust companies, insurance companies, and building and loan associations, are authorized: (a) To make such loans and advances of credit and purchases of obligations rep-

representing loans and advances of credit as are eligible for insurance pursuant to Title I, Section 2 of the National Housing Act, and to obtain such insurance. (b) To make such loans secured by real property or leasehold, as the Federal Housing Administrator insures or makes a commitment to insure pursuant to Title II of the National Housing Act, and to obtain such insurance.

"Section 2. It shall be lawful for banks, savings banks, trust companies, insurance companies, building and loan associations, to purchase, invest in, and dispose of bonds or notes secured by mortgages insured by the Federal Housing Administrator, and in debentures issued by the Federal Housing Administrator, pursuant to Title II of the National Housing Act, and in securities issued by national mortgage associations or similar credit institutions now or hereafter organized under Title III of the National Housing Act.

"Section 3. No law of this State requiring security upon which loans or investments may be made, or prescribing the nature, amount or form of such security, or prescribing or limiting interest rates upon loans or investments, or prescribing or limiting the period for which loans or investments made pursuant to the foregoing paragraph.

"Section 4. This Act shall take effect immediately upon its passage and approval by the Governor."

The Act above quoted has been amended on three separate occasions.

On August 15, 1935, the Act approved January 31, 1935, was amended by adding thereto a Section 5.

"Any bank, savings bank or trust company, purchasing, investing in, or otherwise holding in any fiduciary capacity for the benefit of any ward or other beneficiary, any mortgage loan insured under the terms of the National Housing Act, shall be entitled to receive and retain for its own individual or corporate account any service charge allowed by said National Housing Act or by any regulations issued thereunder on account of the servicing of the insured mortgage loan. Such service charge shall be considered as a reimbursement to such fiduciary for the additional expense of handling for the mortgagor and the Federal Housing Administrator monthly collections on such mortgage loan and payments of taxes, insurance, and other charges on the property securing such loan as such Act and regulations may require."

On April 15, 1936, Act 115, General Acts Extra Session, 1936, p. 77, was approved which amended the Act approved January 31, 1935 by adding thereto a Section 6 which is as follows:

"Section 6. Wherever securities must be, or may be, furnished by any depository in the State of Alabama as security for the deposit of any funds whatsoever, or wherever securities must be, or may be, deposited with any official of the State of Alabama pursuant to any statute of this state, mortgages insured under Title II of the National Housing Act shall be acceptable at face value as securities eligible for such purposes."

On February 2, 1937, Act 35, General Acts Extra Session, 1936-37, p. 31, was approved, which Act amended Sections 1 and 2 of the original Act of 1935 and Section 5 added to the Act by the 1935 amendment and Section 6 as added by the 1936 amendment.

I am hereafter setting out a composition of the original Act of 1935 with all of its amendments including the last amendment of February 2, 1937.

"Section 1. Banks, savings banks, trust companies, insurance companies, and building and loan associations, are authorized: (a) To make such loans and advances of credit and purchases of obligations representing loans and advances of credit as are eligible for insurance and to obtain such insurance, (b) To make such loans secured by real property or lease-hold, as the Federal Housing Administrator insures or makes a commitment to insure and to obtain such insurance.

"Section 2. It shall be lawful for banks, savings banks, trust companies, insurance companies, building and loan associations, to purchase, invest in, and dispose of bonds or notes secured by mortgages insured by the Federal Housing Administrator and in debentures issued by the Federal Housing Administrator, and in securities issued by national mortgage associations.

"Section 3. No law of this State requiring security upon which loans or investments may be made, or prescribing the nature, amount or form of such security, or prescribing or limiting interest rates upon loans or investments, or prescribing or limiting the period for which loans or investments may be made, shall be deemed to apply to loans or investments made pursuant to the foregoing paragraph.

"Section 4. This Act shall take effect immediately upon its passage and approval by the Governor.

"Section 5. Any bank, savings bank or trust company purchasing, investing in, or otherwise holding in any fiduciary capacity for the benefit of any ward or other beneficiary, any mortgage loan insured by the Federal Housing Administrator, shall be entitled to receive and retain for its own individual or corporate account any service charge allowed by said Administrator on account of the servicing of the insured mortgage loan. Such service charge shall be considered as a reimbursement to such fiduciary for the additional expense of handling for the mortgagor and the Federal Housing Administrator monthly collections on such mortgage loans and payments of taxes, insurance, and other charges on the property securing such loan as such Administrator and regulations may require."

"Section 6. Wherever, by statute of this state, collateral is required as security for the deposit of public or other funds; or deposits are required to be made with any public official or department; or an investment of capital or surplus, or a reserve or other fund, is required to be maintained consisting of designated securities, notes and bonds insured by the Federal Housing Administrator and debentures issued by the Federal Housing Administrator and obligations of national mortgage associations shall be acceptable at face value for such purposes."

Referring to the above composite Act, it is to be noted that Sections 2 and 3 are the only ones which could possibly have any bearing upon the ques-

tion as to whether or not the 1931 Building and Loan Association Act has been modified and in what particulars.

Section 2 of the Act merely makes it legal for the designated lending agencies to purchase, invest in and dispose of bonds or notes secured by mortgages which have been insured by FHA. This section in my judgment merely adds another power to those which building and loan associations already had and does not in any way amplify or modify the provisions of law applicable to the method by which such purchases or investments are to be made.

Section 3 expressly relieves building and loan associations from certain restrictions which had been placed upon them by the 1931 Act. Said Section 3 provides that loans guaranteed by FHA when made by the designated lending agencies among which is building and loan associations, are relieved from statutory limitations dealing with the following:

1. Restrictions requiring the security upon which loans or investments are to be made.
2. Restrictions prescribing the nature, amount or form for such security.
3. Prescribing or limiting interest rates upon loans or investments.
4. Restrictions limiting the period for which loans or investments may be made.

These are the only restrictions which Section 3 expressly removed from an FHA loan which in my judgment must be considered as the legislative intent to have all other restrictions remain in full force and effect.

My investigation discloses that the building and loan associations, banks, insurance companies, similar financial institutions are generally designated as lending agencies in dealings with FHA matters. One who desires a loan with which to construct his home for instance, submits an application to a lending agency who likewise submits copy of the application to FHA. Both the lending agency and FHA investigate the application and applicant and if it is found desirable the lending agency lends its own money to the applicant.

The FHA merely insures the payment of the loan. In the event of default by the applicant, it is incumbent upon the lending agency to foreclose and secure title to the real estate securing the loan. A deed is then given FHA by the lending agency or mortgagee in return for which FHA issues to the lending agency or mortgagee debenture bonds carrying a rate of interest of 2-3/4 to 3%, which bonds become due on a date some two or three years after the date of maturity of the original mortgage.

Since the so-called FHA loan is merely a loan which is insured by the Federal Government, the making of such a loan would not within itself abrogate the limitations or restrictions in the 1931 Act. The extent to which those limitations or restrictions have been abrogated or amended has been set out above.

The premises considered, it is my opinion that your inquiries should be answered as follows, (For convenience I answered your second inquiry first and then your third inquiry and combined your first and fourth inquiries.):

1. Building and Loan Associations are authorized to make FHA insured loans but only to applicants who are members of said Association.

2. A person who subscribes for one share or more of stock in a Building and Loan Association, pays any part of the agreed purchase price in cash, and agrees to pay the balance in installments or at some future date, is a member of the Association that sells the stock so purchased. Section 1 of the 1931 Act provides in part as follows:

"Section 1. BUILDING AND LOAN DEFINED. \* \* \* The word 'Member' shall include any shareholder of any type whatsoever in a building and loan association."

This view is strengthened by Section 31(3) and (7) of the Act in question. The former provision (3) refers to a person who has paid an installment, as a shareholder, while a member, as defined in Section 1 (Act No. 169, supra) is a shareholder. Subsection (7), supra, permits the Association's by-laws to prescribe the voting power of members. Thus, the voting power of a member who has not fully paid his "dues" may be limited. The association of the aforementioned provisions with the Act is indicative of legislative intent that a purchaser of stock, for which payment is made only in part, is a member of the Association which sold the stock.

3. A Building and Loan Association is not authorized to sell FHA insured loans except with the consent of a majority of its Board of Directors and with the approval of the Commissioner. The funds derived from the sale of said FHA insured loans shall be used for the retirement of shares and certificates presented for withdrawal and for no other purpose.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

November 9, 1938.

Hon. J. Hubert Farmer, Solicitor,  
20th Judicial Circuit,  
Dothan, Alabama.

Solicitor—Telephones—Court of County Commissioners authorized to reimburse Circuit Solicitor for monies paid in good faith for telephone bills embracing rent and official calls made by Solicitor on telephone installed in courthouse.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of October 5, 1935, in which you request my opinion as follows:

"On February 14, 1933, I was appointed Solicitor of the Twentieth Judicial Circuit. I forthwith took the oath of office and assumed the duties thereof. Subsequently, I was elected to a full term as Solicitor of this Circuit.

"During all of this time, I have had an office in the Houston County Courthouse. During this time also, there has been a telephone in my office. This telephone has not been listed in my name but has been listed as 'Circuit Solicitor Ct. House' under the general listing of 'Houston County'. However, during all of this time, I have paid the monthly rent on the telephone and have paid for all official calls out of my salary but have not until recently made a claim therefor. On or about September 26, 1938, I filed a claim with the Court of County Commissioners for monthly telephone rent paid by me and am planning to file claim for official calls made from the said phone for which I also paid.

"Question: Under the acts of the Legislature of 1933, Page 201, Lapsley Bill No. 187, Code Section 186, Alabama Code 1923, and other pertinent laws, may the County of Houston legally reimburse me for: (a) any or all of said monthly telephone rents so paid by me; (b) the official toll calls made by me during said time?"

✓ In my opinion, your question is controlled by Section 186 of the Code of Alabama of 1923, which section provides, in part, as follows:

// "Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, To reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the used of the county. \* \* \*

✓ You will notice that the foregoing section authorizes the county governing body to appropriate from the general or special funds of the county, such funds as it may determine, for the purpose of reimbursing any person who "in good faith" has advanced money for the use of the county.

It appears from your letter that your expenditures for the payment of telephone bills in question were certainly in good faith, inasmuch as you state that the phone was, in fact, listed as "Circuit Solicitor Ct. House" under the general listing of "Houston County."

This office has hitherto held that if the Circuit Solicitor occupies an office in the Courthouse, the county may have a telephone installed therein and pay from its general funds the rent therefor, and may also pay for all official calls made by the solicitor. See opinion to Hon. Saxon P. Poyner, Judge of Probate, Dothan, Alabama, under date of March 16, 1937, Quarterly Report of the Attorney General, Volume 6, page 125.



It therefore appears that the county was authorized to pay both the rent on the telephone installed in the Courthouse and the bills presented for the official calls made by the solicitor if properly authenticated. Inasmuch as you state you have yourself paid all bills presented for such rent and official calls, it is my opinion that under Section 186, supra, the county may make such appropriation as it shall determine to reimburse you for such expenditures.

You are advised, however, that this office has stated in an opinion rendered to Hon. W. C. Beebe, Attorney, Bay Minette, Alabama, Biennial Report of the Attorney General, 1930-32, page 515, that the commissioners court should scrutinize all such claims filed by you and be convinced that such toll calls were connected purely with the official duties of your office and were necessary, and the claim should not be allowed unless an itemized statement is filed with the commissioners court showing the dates of such calls, from whom, to whom and the amount of the same.

You will note that by General Acts 1933, page 201, the county is authorized to pay for telephones in those offices which the county governing body has "designated" as a proper office in which a telephone may be installed. The foregoing conclusions therefore are premised upon the consideration that the county governing body had "designated" the office of the Circuit Solicitor as one in which a telephone was to be installed. See opinion to Hon. Saxon P. Poyner, March 16, 1937, supra.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

November 29, 1938.

Hon. John Ben Darden,  
Tax Assessor, Chambers County,  
Lafayette, Alabama.

General Acts of 1935, p. 256, Section 348, Schedule 158.12 (D)—  
County Tax Assessor—when not required to assess municipal motor  
vehicle tax.

County tax assessor is under no duty to assess municipal ad valorem tax on motor vehicles when a municipality fails to levy the tax or discontinues the same.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

This opinion is addressed to your inquiry as follows:

"For several years this office has been assessing tax on automobiles for the Incorporated Town of Five Points, which is in this county. I

understand from one of the Councilmen that they have voted to discontinue the tax on all property located in the Town. I have received no official notice to this effect but I understand that I will receive one about next Monday or Tuesday.

"Please advise me at your earliest convenience if I will be correct in discontinuing the assessment of automobiles in the Town of Five Points upon the receipt of an official notice from said town."

The Revenue Act of 1935, Act No. 194, p. 256, Schedule 158.12 (d) imposes upon the tax assessors the duty of assessing ad valorem taxes on motor vehicles due all cities in the state.

No ad valorem taxes on motor vehicles are due a municipality in the absence of a lawful levy as required by Section 2124, Code of Alabama, 1923, from which I quote as follows:

"After the first day of October of each year, cities and towns may levy tax upon all property and all subjects of taxation liable therefor, at a rate not in excess of the constitutional limit, \* \* \* ."

If the governing body of Five Points fails to levy a tax, or repeals the levy already made, no ad valorem taxes on motor vehicles would be due that municipality, and you would be under no legal obligation to assess the same.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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November 29, 1938.

Hon. Chas. W. Lee,  
State Comptroller,  
Capitol.

**Tax Collectors—Duty to remit taxes paid under protest.**

1. Under Sections 356 et seq. of the Compilation of the Revenue Laws of 1929, and Section 380 of the Revenue Act of 1935, considered in the light of Sections 238 of the Compilation of Revenue Laws of 1929 and 192 of the Revenue Act of 1935, it is the duty of the county Tax Collector to remit to the several state and county agencies the taxes collected by him which are paid under protest by the taxpayer, whether or not suit is then or thereafter filed by said protesting taxpayer.

2. County Tax Collector is without authority to hold state or county taxes paid to him under protest in a "trust fund" or under other similar arrangement, pending final determination of the propriety of the amount of, or the validity of the assessment of said taxes.

3. In the absence of specific statutory provision, municipal taxes paid under protest to Tax Collector may be held by him in trust, pending final determination of the propriety of the amount of or of the validity of such assessment.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"In examining the records of the Tax Collector of a certain County of this State recently, it was found that in a considerable number of cases taxes assessed for the years 1931 to 1936 had been paid under protest by the taxpayers. In some of these cases litigation regarding the assessments paid was pending in the Circuit Court of the County on appeals from the Board of Review, Probate Court, or escape assessments by the Tax Assessor, at the time the payments were made; in others no such litigation was pending at the time the payments were made but was instituted shortly thereafter; and in others no litigation regarding the assessments paid was pending at the time of payment and none has since been instituted. It has been the practice of the Tax Collector to deposit such payments with the County Treasurer to the credit of a special Trust Fund, from which remittances have been made on checks drawn by the Tax Collector.

"In most of the cases in which litigation regarding the assessment was pending when payment under protest was made, such amounts have been held by the Tax Collector in the trust fund until he received notice of the final determination of the litigation in each case, and at that time or shortly thereafter he has disbursed the amounts paid under protest in accordance with the judgment of the court as a refund to the taxpayer or in distribution to the State, County and Municipal Treasurers, as required by the revenue laws of this State, without accounting for or collecting the interest which accrued from the date of payment under protest to the date of the final judgment of the Court. In a few such cases, however, apparently through oversight or on account of failure to receive immediate notice of the judgment rendered by the Court in the case, amounts paid under protest were not remitted until several months or years after after the date of the final judgment. In numerous other cases, most of which were assessments of taxes for the tax year 1934, no litigation has been commenced regarding the assessments paid, but the amounts paid were not remitted until several months or years after dates of payment by the taxpayers, and in many cases the amounts paid are still held in trust by the Tax Collector.

"The Tax Collector states that in the cases in which no litigation has been filed the taxpayers or their attorneys have notified him and still say that they contemplate instituting legal proceedings against the Tax Collector and the sureties on his bond for refund of the taxes paid in full or in part. And on account of the doubt in the mind of the Tax Collector as to the possible difficulty and delay in obtaining reimbursement if a judgment should be obtained against him and his sureties in the threatened litigation, the Tax Collector has declined to distribute to the various governmental agencies the taxes paid to him under protest in these cases without the consent of the taxpayers who made the pay-

ments, who have refused to give such consent in the cases in which payments are still held by the Tax Collector. Such amounts held by the Tax Collector at the present time aggregate approximately \$18,000.00, and except for \$936.00 paid on January 4, 1937 for 1936 taxes, all the payments were made between October 1, 1934 and September 30, 1935.

"In view of the above facts please advise me regarding the law in effect in this State during the period from October 1, 1931 to September 30, 1937 as follows:

"1. Is the Tax Collector required by law to remit taxes paid under protest to the State, County and Municipal Treasurers on the first and fifteenth of each month following the date collected as regular ad valorem tax collections are required to be remitted in cases in which litigation regarding the taxes is pending at the time of payment or is instituted shortly thereafter; or should such funds be held until after final determination of the litigation and remitted on the first or fifteenth of the month following the date of final judgment? If you are of the opinion that the Tax Collector should hold such funds pending final determination of the litigation and the final judgment does not waive interest from date of payment under protest to date of the judgment, is the taxpayer liable for interest for such intervening period on the amount of the taxes found to be due by the Court?

"2. Is the Tax Collector required by law to remit taxes paid under protest, to the State, County, and Municipal Treasurers on the first and fifteenth of each month following the date collected, as regular ad valorem tax collections are required to be remitted, when no litigation is pending at the time of payment regarding the assessments, but the Tax Collector is then notified by the taxpayer who continues to state for several months or years thereafter that he contemplates filing suit for refund of the taxes in full or in part, and threatens suit against the Tax Collector and the sureties on his bond if taxes paid are distributed by the Tax Collector to the various governmental agencies; or the taxpayer demands that the Tax Collector hold the money paid under protest pending the final determination of another case pending in a court in the same or another county, or in the Court of Appeals or Supreme Court of this State in which the same legal questions are in issue and to be determined as are involved in the cases in which the taxes were paid under protest?

"3. If the Tax Collector fails or refuses, under the circumstances described above to remit taxes so paid to him under protest within the time required by law, as determined in your answer to the two preceding questions, is the Tax Collector liable on his bond for interest from the date remittances of such amounts should have been made to dates of actual remittance?"

Answering your first inquiry, it is my opinion that the Tax Collector is without authority to hold the state and county tax monies collected in a private "trust fund", pending the determination of litigation involving the amount of or the validity of the assessment of such taxes. This is true, in my opinion, whether the same be under the provisions of the revenue law in effect in 1931, or under the provisions of the law now effective. By Sections 356 et seq. of the Compilation of Revenue Laws of 1929 (Acts 1927, page 635, Sections 1, 2, and 3) it is provided:

"356. Whenever the validity or amount of any tax is questioned; how paid.—Whenever the amount or validity of any tax which may be levied against any tax payer or his property, whether the same be ad valorem tax, privilege tax, franchise tax, or other tax, is in litigation, the tax payer may, pending such controversy or litigation, elect to pay the tax under protest and upon such election and the payment of such tax, the officer of the State or County receiving the same shall note on the receipt that said tax is paid under protest or pending litigation.

"357. Rights not affected.—The payment of the tax as provided in Section 1 in this Act shall not affect the right to test and determine the validity or amount of said tax in any manner provided by law, and the proceeding to determine the validity of said tax shall proceed as if said tax had not been paid, but upon proof of payment of said tax before the court in which said action may be pending, the fact of payment shall be ascertained and recited in the judgment, and if the tax shall have been paid in full, no execution shall issue against the taxpayer except for such costs as the taxpayer may be liable for, and in the event it shall be determined and adjudged that the tax so paid was invalid in whole or in part or excessive in amount, the court hearing such proceeding shall so ascertain and determine, and by its judgment or decree shall fix the amount of the tax which was invalid, or which was excessive, and thereupon upon the presentation of a certified copy of the judgment to the State Auditor, it shall be the duty of the State Auditor to draw his warrant on the State Treasurer in favor of such tax payer for such an amount as the judgment of the court shall ascertain and declare has been erroneously paid to the State, and such warrant of the State Auditor shall be payable out of any funds in the State Treasury not otherwise appropriated.

"358. Board of Revenue to pay according to the results of the litigation.—Upon the presentation of a certified copy of such judgment to the Board of Revenue, or other governing body of any County which may have received any part of said tax erroneously paid, as determined by the judgment, it shall be the duty of the said Board of Revenue or other governing body of the County to draw its warrant on the County Treasurer in favor of the tax payer for such amount of said tax as may have been erroneously paid to the County."

Under the provisions of Section 238 of the Compilation of Revenue Laws of 1929, it was the duty of the Tax Collector on the first and fifteenth days of November, and on the first and fifteenth days of each month thereafter until he made his final settlement for that year, to remit to the custodians of State and county funds so collected, the amount thereof, and to make itemized reports upon the same.

Under Section 192 of the Revenue Act of 1935, the Tax Collector is required on the fifteenth day of October, and the first and fifteenth days of each month thereafter until he makes final settlement for such year, to make to the county custodian of county and school funds, to the Judge of Probate of the county, and to the State Comptroller, a report in writing itemizing separately the taxes, interest and penalties collected by him for the State and County and schools, and within five days thereafter he is required to pay such amounts collected by him to the several custodians thereof.

Section 380 of the Revenue Act of 1935 provides:

"Section 380. Whenever any money for taxes paid to any officer authorized to receive or collect same is under protest, such officer shall distribute to the various governmental agencies the proportion due such governmental agencies in the manner and at the times provided in this Act, and at the time of such distribution, shall note the fact that such payment was made under protest, and the Treasurer or custodian of funds of such governmental agency, shall in giving his receipt therefor, note that such tax was paid under protest. Any Tax Collector or other officer authorized to receive and collect taxes noting such fact, shall not be personally liable for such payments should such taxes ultimately be held illegal or excessive."

So that the Legislature has provided a complete scheme for the payment of taxes under protest, and has provided machinery for the refund of the monies erroneously collected, insofar as the state, county and school funds are concerned, in such manner that there can be no liability upon the Tax Collector personally or upon his official bond, for the immediate distribution thereof in the manner provided by law. In view of such machinery, which is adequate for the protection of the Tax Collector and his surety, he is without authority to hold the money in the county treasury in a special trust fund, or in any other manner, and it then and there becomes his duty, upon the collection of the same, to remit to the several agencies or custodians as the law provides. Cf. Quarterly Report of the Attorney General, Vol. I, page 354.

With reference to taxes collected by municipalities, Section 3095, Code of 1923, which has been carried forward as Section 201 of the Revenue Act of 1935, provides that any municipal corporation may, by ordinance duly adopted, provide for the assessment, equalization and collection of taxes due such municipality, by the officers and boards provided by the State law, and that all the machinery thereby provided for the collection of state and county taxes, and the enforcement of the same, the sale of property for delinquency, and the redemption from such sales, shall be applicable to the assessment and collection of such taxes. No specific provision is contained therein for refund of municipal taxes assessed and collected as is there provided, nor for holding the Tax Collector and his surety harmless on account of wrongful collection thereof. In the absence of such special provision, it is my opinion that, as to municipal taxes so collected, the Tax Collector, in order to protect himself and the surety upon his official bond from apprehended liability on account of excessive or wrongful levy or collection, may agree with the city authorities for the deposit of such municipal revenue collected by him under protest in a trust fund to await final determination of the validity of said assessment and the propriety of the amount thereof. In the event he is unable to agree with the municipal authorities upon such depository arrangement, it is my opinion that he may nevertheless hold the same or deposit the same in a trust fund until such final determination is made.

Of course, in the event that local statutes provide machinery for the refund of city taxes erroneously or wrongfully collected, and such provisions are adequate to protect the Tax Collector and the surety upon his official bond from liability on account of erroneous or wrongful collection thereof, the local statutes would govern; and his duty to remit to the municipal authorities would be governed by the provisions thereof.

In answer to your second inquiry, it is my opinion that when the taxpayer pays under protest the amount of the taxes assessed, the Tax Collector should distribute or remit the same in the manner detailed in answer

to your first inquiry. Whether the protesting taxpayer actually files suit is not material. When the revenues come into the hands of the Tax Collector, even though under protest of the taxpayer, he is bound, under the law, to distribute the same in the manner provided by law; that he is without authority to make any private agreement with the protesting taxpayer, or any private arrangement for the supposed protection of himself or his surety which will deviate from a distribution of the revenues in a manner provided by law.

Answering your third inquiry, it is my opinion that in the event a Tax Collector fails or refuses to remit state and county taxes paid to him under protest, but persists in holding the same as a trust fund for the supposed protection of himself and his official band (which is unauthorized by law), he and his surety are liable for the interest and penalties for failure to remit, in the same manner that they would be liable for interest and penalties for his failure to remit in cases where there were no protests.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

November 29, 1938.

Hon. Hunter Phillips,  
Tax Assessor,  
Choctaw County,  
Butler, Alabama.

Homestead exemptions—on forms prescribed by the State Tax Commission.

Homestead exemptioner required to claim exemption on forms prescribed by the State Tax Commission.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter as follows:

"Please give me an opinion on the following matter at your earliest convenience.

"The State Tax Commission advises me that it is necessary to make an application on form number one prescribed by the Commission for the homestead exemption where there have been changes made in the description or value since the original application was made. Also advise if it is necessary for a new home owner to make this application. In other words is this application necessary in addition to the regular claims on the tax return sheet which the taxpayer signs?"

In an opinion to Hon. Madison L. Smith, Tax Assessor, Washington County, Chatom, Alabama, Vol. 9, Quarterly Report of the Attorney General, page 10, this office held that a homestead exemptioner "must assert his claim therefor or failing therein, that he waives the tax gratuity." No mention was made about the forms on which such assertion should be made.

It is my opinion that the claimant of a homestead exemption must, in pursuit of his exemption, execute the forms prescribed by the State Tax Commission, reasonably adapted to the lawful purposes for which authority is granted, or failing therein, he loses the tax gratuity to which he is entitled.

The legislature has vested general superintendence of ad valorem taxes, due to the state and county, in the State Tax Commission of Alabama. Revenue Act of 1935, General Acts of 1935, p. 256—Section 93 (a) (b). Likewise, the State Tax Commission is specifically authorized to prescribe the assessment forms upon which returns must be listed. General Revenue Act of 1935, Section 27.

If the State Tax Commission intended the forms mentioned in your inquiry to constitute and be a part of the assessment forms which it is authorized to prescribe, and they do in fact so constitute and form a part thereof, to better enable the Commission to exercise that general superintendence over the assessment and equalization of state and county ad valorem taxes, then the proper execution thereof on the part of the taxpayer and exemptioner, although he may have listed his homestead on another and additional form, is necessary. Any homestead exemption allowed in the absence of such execution would be illegal and void for the reason that the same has not been claimed or asserted in the manner prescribed by law.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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November 30, 1938.

Hon. John C. Coleman,  
The Adjutant General,  
Capitol.

Appropriations—National Guard—

Appropriations made for military purposes by General Acts, 1931, page 402, as amended by General Acts, Extra Session 1932, page 298, have not lapsed nor have they been annulled or repealed; and they are still available if, as and when, the Governor exercises his judgment that the condition of the Treasury warrants the payment thereof, and he approves the same.

Opinion by Assistant Attorney General Rowe.



Dear Sir:

I have your request for opinion as follows:

"By the provisions of an act to provide for the establishment of a base of operations and training for the Air Service of the Alabama National Guard (General Acts 1931, p. 402, Section 21, as amended by Acts, Extra Session, 1932, p. 298), money was appropriated for such purposes.

The act as amended provides:

"There is hereby appropriated out of any funds now and/or hereafter in the State Treasury the sum of One Hundred Forty Two Thousand Dollars (\$142,000.00) for the use of said Commission in the effectuation of the purposes of this Act. Said sum to be paid at the times, in the manner and subject to the condition following, that is to say: \$1.00 during the fiscal year beginning October 1st, 1932; \$1.00 during the fiscal year beginning October 1st, 1933 and \$140,000.00 during the fiscal year beginning October 1st, 1934; provided, however, that no part of said appropriations shall be paid out of the State Treasury until and unless such payments shall be authorized and approved by the Governor and when and if, in the opinion of the Governor, the Treasury warrants and justifies the payment thereof."

"Will you please advise me if the above appropriations act has been annulled or repealed by any provision of law; and if, in the event the Governor is of the opinion that the condition of the treasury warrants and justifies the same, the said sums so appropriated, may be employed in the manner there provided."

In my opinion, the appropriations made in the Acts, Extra Session 1932, quoted supra, are still effective, and that if in the opinion of the Governor the condition of the Treasury warrants and justifies the payment of the same, and he approves thereof, the moneys appropriated may be employed in the manner provided in said Act.

The Supreme Court dealt with a similar situation in the case of **Southern Industrial Institute v. Lee, as Comptroller**, 175 So. 365. There the court had under consideration an Act of the Legislature of 1927, appropriating the sum of \$50,000.00 for the construction and equipment of buildings of the Southern Industrial Institute. The appropriation was made available only upon the approval of the Governor and subject to his judgment as to the condition of the Treasury, in substantially the same manner as is the appropriation considered in this opinion.

The respondent, the State Comptroller, insisted that the appropriation there made was repealed by the Budget and Financial Control Act, (General Acts, 1932, p. 35). Section 10 thereof provides:

"Section 10. REPEAL OF DEFINITE, INDEFINITE AND CONTINGENT PERMANENT APPROPRIATIONS: All permanent appropriations, definite, indefinite, and contingent in amount, except those provided in the Constitution and those provided in existing statutes in payment of interest on indebtedness arising out of the disposition of lands donated

to State institutions by the Federal Congress, heretofore made to any department, institution, bureau, board, commission or other State agency, are hereby repealed as of the close of the fiscal year ending September 30, 1932; Provided that this section shall not become effective until the Legislature enacts current annual appropriations, including per capita appropriations for all eleemosynary and correctional institutions and the Alabama School for Deaf and Blind, for definite amounts that may be expended (after allotments by the Governor as provided for in Section 20) by such departments, institutions, bureaus, boards, commissions and other State agencies for the three remaining fiscal years of the current quadrennium ending on the 30th of September 1933, 1934 and 1935."

Disposing of the questions, the Supreme Court said:

"We are acquainted, as a matter of common knowledge, with the history of the Budget Act, the large outstanding floating debt of the State, the insufficiency of funds in the treasury, and appropriations far in excess of the state's revenues. The act was designed to make the state operate within its income. To that end, there was vested in the Governor direct and effective supervision over all of the state's financial affairs. See Section 2 of the act, and *Abramson v. Hard*, 229 Ala. 2, 155 So. 590.

"The appropriation here in question is in harmony with that theory, as its release is wholly dependent upon the will of the Governor, who, under the Budget Act, has direct supervision over the state's finances.

"The word 'permanent' has a well-defined meaning, as follows: 'Continuing in the same state or without essential change; durable, fixed, stable; opposed to temporary'. The Standard Dictionary and Webster's New International Dictionary (2nd Ed., unabridged). The word 'continuing', in the above definition, indicates such character of continuous appropriation referred to in 59 Corpus Juris, 257; and the reference in this same section to current annual appropriations adds some force to this suggestion.

\* \* \* \* \*

"So it is in the instant case. The appropriation is local and special—the erection of a building—and when the building is completed and the payment made, the act is at an end. It has served its purpose and becomes 'historical and evidential only'.

"There is nothing in the act to indicate that the lawmakers did not intend the word 'permanent' to be given its ordinary and usual meaning (*State v. Praetorians*, 226 Ala. 259, 146 So. 411), and the courts have no right to ignore the express language used, but should construe the whole act, and each clause as standing in *pari materia* (*Wages v. State*, 225 Ala. 2, 141 So. 707; 18 Alabama Digest, Statutes, p. 125; 59 Corpus Juris, 993). In *Michael v. State*, 163 Ala. 425, 50 So. 929, 933, the court quoted approvingly the statement that 'generally speaking, a permanent statute \* \* \* is one which is understood to continue in force till its repeal.'

"The act in question is not of that character. When it has served its purpose, it is at an end without further legislative action.

"Whether the setting of section 22 in the act could be taken as indicating an intention that its provisions should have reference to future appropriations only, as held in the court below, we need not stop to inquire, as we entertain the view the appropriation act in question was not a 'permanent' one within the meaning of section 10, and, therefore, was not repealed. This section (section 22), it is to be observed, provides, in part that 'appropriations for the purchase of land or the erection of buildings or new construction shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made', and we think, in any event, this evinces a legislative policy that appropriations of this character should not lapse, but that the work should be completed.

\* \* \* \* \*

"We have previously referred to the fact that this appropriation is expressly subject to the Governor's approval. He it is who supervises the state's finances, and there was no inconsistency whatever in the Legislature leaving this particular appropriation unaffected by the Budget Act, as the treasury of the state was as well guarded the one way as the other, and by the same high authority. And until released by the Governor, it is not a proper claim for presentation to the comptroller, and, therefore, is not such an 'unpaid appropriation' as is referred to in article 23 of the constitution Amendments (See General Acts 1933, Ex. Sess. p. 196).

"We therefore conclude that the appropriation for the erection of buildings for the Institute was not a permanent appropriation within the meaning of section 10 of the Budget Act, and was of consequence not repealed, but is yet in full force and effect."

In my opinion, the principles there announced, are controlling in this instance. (See Quarterly Report of Attorney General, Vol. VIII, page 314).

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 2, 1938.

Hon. M. H. Wilkins, Sheriff,  
Baldwin County,  
Bay Minette, Alabama.

Sheriffs—The payment for services rendered in executing Venereal Disease Detention Orders pursuant to Section 1106 of the Code, is included in the ex-officio fees of the sheriff, or may be realized pursuant to Section 1151 of the Code.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter wherein you request my opinion as follows:

"Doctor Vandergrind, the County Health Officer of this county, recently delivered to me several Venereal Disease Detention Orders as set out in Section 1106, Code of 1923, as amended in 1927, under this authority he placed several persons in jail.

"I would appreciate your informing me as to who is liable for the cost in such procedure. I have been unable to find any orders whereby this cost might be collected."

In answer to your inquiry, please be advised that the payment of the cost of the procedure as outlined in Section 1106 of the Code of 1923, as amended by Laws of 1927, p. 716, is not specifically provided for.

It is my opinion that payment for the service where not realized under the provisions of Section 1151, infra, is provided for by Section 7287, Code of Alabama, as amended by Laws of 1931, p. 261, which provides in part as follows:

"Fees allowed to sheriffs \* \* \* for all other public services not otherwise provided for, such sums as may be just to be allowed by the County Commissioners Court, upon presentation of a verified account showing the items of service rendered, to be paid out of the county treasury not exceeding six hundred (\$600.00) dollars per annum provided, that any sheriffs whose annual income from fees of office exceed five thousand net, after all expenses have been paid by him, shall not have any ex-officio allowance, to be paid quarterly."

Further, Section 1151, Code of Alabama (Michie's) which is contained in the Chapter on Health and Quarantine provides as follows:

"Section 1151. RECOVERY OF EXPENSES BY HEALTH OFFICER, SHERIFF, ETC.—When an expense has been incurred by any health officer, sheriff or bonded constable, in the execution of the duties required by the provisions of this article, said health officer, sheriff, or bonded constable, as the case may be, shall have the right of action against the person responsible for the recovery of the same; but no more than is fair and reasonable shall be recovered, as the court or jury shall determine."

You will note, therefore, that you have an alternative provision for collecting the cost of enforcing the detention order delivered to you by the County Health Officer under authority of Section 1106 of the Code. That is to say, this cost may be collected by you as part of your ex officio fees contained in Section 7287, supra, or may be collected by you in the procedure outlined in Section 1151 above quoted.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 2, 1938.

Hon. Henry S. Long, Chairman,  
State Tax Commission,  
Capitol.

Income Tax—Income received by an attorney from the United States representing fees allowed for handling War Risk Insurance under the World War Veterans Act constitutes taxable income to the recipient subject to income tax under the Revenue Act of 1935.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of October 13, 1938, which is as follows:

"An opinion is requested as to whether or not income received by an attorney from the United States District Court representing fees allowed for handling War Risk Insurance under the World War Veterans Act, 1924, and amendments thereto constitutes taxable income to the recipient subject to income tax under the Revenue Act of 1935.

"It would appear that such income is received under contract practice and not exempt since the attorney is not an officer or employee of the United States, under Section 345.10 sub-division (f) of the Act. However, we have a case pending, the income from such fees being claimed exempt under Section 345.10 sub-division (e) of the Act."

I am of the opinion that your inquiry should be answered in the affirmative.

As I understand the procedure, the attorney referred to in your inquiry, represents the claimant for War Risk Insurance. The court in rendering judgment also fixes the amount of the attorney's fee. The fee is paid direct to the attorney by the court rather than paid to the claimant and then in turn paid to the attorney. The attorney represents the claimant and is in nowise an officer or employee of the United States. Therefore, the amount received by said attorney would not be exempt under the provisions of Section 345.10 (f) of the Revenue Act of 1935.

The question then presents itself as to whether or not the amount received by the attorney in question would be exempt under the provisions of Section 345.10 (e) of the Revenue Act of 1935. Said exemption is as follows:

"(e) Any amount received through accident or health insurance, or under any workman's compensation Act as compensation for personal injuries or sickness, plus the amount of any damages received, whether by suit or agreement on account of such injuries or sickness, or **through the War Risk Insurance Act**, or any law for the benefit or relief of injured or disabled members of the 'Military or Naval Forces of the United States'." (*Italics supplied*).

The term "through the War Risk Insurance Act", in my judgment, refers to the amount received by the beneficiary only. The exemptions contained in said subsection deal with amounts received by beneficiaries under the various provisions contained therein and the doctrine of ejusdem generis is clearly applicable.—*Eliasberg Bros. Mercantile Co. v. Grimes*, 204 Ala. 492, 86 So. 56. Therefore, the amount received by an attorney representing a claimant for War Risk Insurance, in my judgment, does not fall within the terms of the exemption in question.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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December 2, 1938.

Hon. Matt A. Boykin,  
Judge of Probate,  
Mobile County,  
Mobile, Alabama.

Notaries Public—Acknowledgements taken by a clerk in a probate office in his capacity as a notary public is an act in the capacity of a notary public alone, and he may charge the proper fee for taking said acknowledgements.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge the receipt of your letter of August 13, 1938, which is as follows:

"Please advise me if employees in my office who hold a commission as a Notary Public are entitled to the charge of the usual 50c fee, or 25c without seal of a Notary Public for taking jurats to applications made by property owners to redeem property from tax sales.

"Very frequently some of our employees who hold a commission as Notary Public have done work of this character without making any charge therefor but I wish to permit these employees to receive the usual Notary Public fees if, in your opinion, this is proper.

"Then, too, heretofore in making tax deeds I have had the same notarized by one of the employees in my office who was a Notary, without making a charge therefor. Is such employee entitled to a Notary fee of 50c for taking my acknowledgment of a tax deed?"

In answer to your inquiries, I am of the opinion that acknowledgments taken by a clerk in the probate office in his capacity as a notary public is an act in the capacity of a notary public alone.—**Biennial Report of Attorney**

**General, 1932-1934, p. 624.** Therefore, for taking said acknowledgment he may, if he sees fit, charge the proper fee.

If the notary public in question takes jurats of applicants for redemption of property from tax sales, said applicants would be the proper parties to pay the fee.

If the notary public in question notarizes the signature of the Probate Judge in making tax deeds, the grantee, in my opinion would not have to pay said notary fee. There is a specific fee of one dollar which is paid by the purchaser securing tax deed under Section 241, Revenue Act of 1935. Section 242 provides that the Judge of Probate's signature must be acknowledged. Therefore, in my opinion, the notary fee would be payable by the Probate Judge, if one were charged.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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December 6, 1938.

Hon. George E. Pass,  
Chairman, Board of Education,  
Blount County,  
Oneonta, Alabama.

Schools—

1. The educational policy of a county school system, the location of the schools in said system, the grading and standardizing of the same, the courses of study to be taught, and the selection of the teaching personnel are all matters that require the concurring action of the County Superintendent of Education and the County Board of Education.

2. Action in any of the above matters by the County Superintendent of Education, without the concurring action of the County Board of Education, is ineffective.

3. Action by the County Board of Education in any of the above matters, without the concurring action of the County Superintendent of Education, is likewise ineffective.

4. Disputes between the County Superintendent of Education and the County Board of Education in regard to any of the above matters should be decided by the State Superintendent of Education, whose finding is binding on both the County Superintendent of Education and the County Board of Education.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter which reads as follows:

"On April 22, 1938, the Superintendent of Education of the State of Alabama wrote to the Blount County Board of Education a letter, copy of which is hereto attached and made a part of this request for an opinion from your Department. The Board of Education met on the 29th day of April, 1938, for the purpose of carrying out the instructions in the letter. While the Board was in session the Superintendent of Education of Blount County received telegram from the State Superintendent of Education, copy of which is hereto attached.

"On that same day the Blount County Board of Education unanimously adopted a resolution fixing Cleveland, Alabama, as the proper place for an accredited High School to be located, copy of said resolution is hereto attached and made a part of this letter. Mr. W. F. Maynor, the Superintendent of Education of Blount County, refused to approve this action of the Board of Education.

"On June 17, 1938, the Board of Education of Blount County passed a resolution that no Senior High School grades would be taught at Locust Fork in Blount County, copy of said resolution is hereto attached and made a part of this request.

"Since the adoption of this last resolution the Superintendent of Education has undertaken to employ teachers for the purpose of teaching High School grades at Locust Fork and the teachers at Locust Fork are now actually teaching the Senior High School grades. The Principal and each one of the teachers engaged in teaching at Locust Fork had notice of this resolution that they were not to teach Senior High School grades at Locust Fork, copy of said notice hereto attached.

"On Friday, September 16, 1938, Mr. W. F. Maynor, County Superintendent of Education of Blount County, presented to the Board of Education a list of teachers and their salaries, including the teachers at Locust Fork who are actually engaged in teaching High School grades, for approval by the Board. And the Board again refused to approve the salaries of the teachers teaching High School grades at Locust Fork.

"Was the action of the Blount County Board of Education legal under the laws of Alabama in so doing? And I, as Chairman of the Board of Education, want an opinion as to whether I am authorized to approve the pay roll for payment of the teachers engaged in teaching the Senior High School grades at Locust Fork in the circumstances set forth in this letter."

The copy of the letter written by the State Superintendent of Education to the Superintendent of Education of Blount County and the Board of Education of Blount County on April 22, 1938, follows:

"In view of the fact that the Low Water bridge connecting Locust Fork and Hayden communities washed away after the preliminary field work of the survey staff of this department, and has not been rebuilt, and in view of the fact that the Blount County Board of Revenue has



filed a statement with the State Department of Education that they do not intend to rebuild this bridge, or to improve roads to the other bridges connecting these communities, the survey staff reconsiders its original recommendation and recommends that one and only one senior high school center be located in the area served by the Cleveland and Locust Fork school centers. The accreditation of one of the above named centers will be made upon receipt of a resolution from the Blount County Board of Education designating the center which in its opinion is the more desirable and feasible, and further stating that upon the accreditation of one of these centers the teaching of senior high school grades will be discontinued at the other center. This agreement by the State Department of Education, of course, is based upon the assumption that all other accreditation conditions necessary to the accreditation of a high school have or will be met at the time of accreditation."

The telegram sent by the State Superintendent of Education to the Board of Education of Blount County on April 29, 1938, reads:

"Resolution of County Board of Education locating high school center must be recommended by or be approved by County Superintendent of Education, authority for this found in Sections 97, 119, 151, 154 and 159 of the Alabama School Code."

The motions or resolutions adopted by the State Board of Education of Blount County on April 29, 1938, and June 17, 1938, read, respectively, as follows:

"H. C. Blackwood made a motion that the following resolution concerning the accreditation of Cleveland School be adopted:

"Whereas, the State Superintendent of Education and those connected with his department have reconsidered the recommendations made by their Survey Staff relative to the number of accredited high schools to be maintained in Blount County, and have given the Superintendent of Education and the members of the Blount County Board of Education notice of their decision in a letter dated April 22, 1938.

"And whereas, they have stated in this letter that upon a receipt of a resolution passed by the Blount County Board of Education designating one of the following places, Cleveland or Locust Fork, as being the most desirable and feasible center to take care of the senior high school grades now being served by these two schools, they will place on the accredited list the school so designated by the Board.

"Therefore, be it resolved by the Board of Education of Blount County that after carefully considering all the facts pertaining to the location of this school, we, the Board of Education of Blount County, do designate Cleveland as the most feasible and desirable location for the high school to serve this area.

"Therefore, we ask that the State Department of Education place the Cleveland High School on the accredited list with the understanding, of course, that the people of Cleveland meet the requirements of the State as to the necessary buildings and equipments.

"The Blount County Board of Education agrees that they will discontinue the teaching of the senior high school grades at Locust Fork and that they will furnish transportation for all the senior high school students in this area to one of the accredited high schools of the county. The Board of Education of the County shall have the right to name the school where these pupils shall be transferred. We ask that this be done at once so that the pupils that are finishing Cleveland High School this year may receive their Diplomas this year from an accredited school."

"A motion was made by H. C. Blackwood that we discontinue teaching the senior high school grades at Locust Fork as passed in resolution of April 29, 1938, unless the State Department agrees to accredit Locust Fork school, the motion, which was seconded by Henry Standridge, was then put to vote, which resulted as follows:

**AFFIRMATIVE**

H. C. Blackwood  
Leon Morris  
Henry Standridge."

**NEGATIVE**

None

The letters addressed to the Principal of the Locust Fork School and to the teachers of said school by you, as Chairman of the Board of Education of Blount County, on August 25, 1938, read respectively as follows:

"On June 17, 1938, the County Board of Education passed a resolution that no Senior High School grades would be taught at the Locust Fork School in Blount County.

"You are hereby requested not to select, or to undertake to employ, more teachers than is reasonably necessary to teach up to, and including, the Junior High School grades.

"And if any of the teachers teach the Senior High School grades they do so at their peril.

"This letter is being forwarded to you at the request and by the direction of the Board of Education of Blount County, Alabama."

"On this day we have sent to your Principal the letter, copy of which is herein inclosed. This will be your instructions to govern you in your teaching at Locust Fork."

I also have before me a letter written by the State Superintendent of Education to the Superintendent of Education of Blount County and the members of the Board of Education of Blount County on October 25, 1938, which reads:

"The situation existing in Blount County with reference to the payment of the salaries of senior high school teachers in the Locust Fork School makes it obligatory upon this office to take action. Section 68 of the Alabama School Code of 1927 provides the following:

"Duties of State Superintendent.—The State Superintendent of Education shall explain the true intent and meaning of the school laws, and of the rules and regulations of the State Board of Education. He shall decide, without expense to the parties concerned, all controversies and disputes involving the proper administration of the public school system. . . ."

"Section 71 of the 1927 Code reads as follows:

"'County and City Boards of Education's Action Relieved.—The State Superintendent of Education under rules and regulations promulgated by the State Board of Education, shall have the authority to review actions and orders of county and city boards of education and of county superintendents of education and city superintendents of schools in matters relating to finance and other matters seriously affecting the educational interest. Upon such review the State Superintendent of Education shall have the power to determine from the facts the just and proper disposition of the matter. The order of the State Superintendent shall be binding.'"

"In my judgment, the educational interest of the school children involved in this controversy should be the primary consideration. Furthermore, the legal rights of the senior high school teachers at Locust Fork cannot be ignored.

"It appears that the regular procedure prescribed by law for the nomination and appointment of teachers have not been observed strictly in the appointment of any of the teachers of Blount County. However, the services of those teachers have been accepted and the acceptance of these services obligates the Board of Education to pay for same.

"In the case of the senior high school teachers at Locust Fork, it appears that those teachers taught school for several days prior to being notified of there being any question as to their employment. Those teachers began teaching with the understanding that they were to be employed for the entire year and taught for several days with that understanding. They received no notification that their employment was in question until after teaching several days. The courts commonly hold that if a teacher is permitted to render service for several days, such service constitutes ratification of a contract. The fact that the Locust Fork teachers were permitted to teach school for several days and the Superintendent and Board of Education had knowledge of this fact constitutes ratification of the contract of the Locust Fork senior high school teachers. Therefore, it is my judgment that the Locust Fork senior high school teachers should be paid for their services for the present school year and I am authorizing that such payment be made. It is to be clearly understood that this action has no bearing whatever upon the future policies of the State Department of Education with respect to the accreditation of senior high schools in Blount County. This controversy is having the effect of demoralizing the instruction at the Locust Fork school. The school children at that school are the chief sufferers. Therefore, this action is taken in the interest of protecting the education of the children now enrolled at Locust Fork.

"Controversies of this nature should be prevented in the future by following strictly the regular procedures set up in the law for the nomination and election of teachers."

It appears from the above that there is a dispute between the Superintendent of Education of Blount County and the Board of Education of Blount County over the accreditation of certain high schools located in the County, the courses of study to be taught at one of the high schools, and the selection of the teaching personnel at one of the high schools, which has resulted in certain teachers having taught in one of the high schools in the County whose selection had not been approved by the Board of Education, and whose salaries the Board of Education refused to pay when the pay roll was presented to it by the Superintendent of Education of the County; that a stalemate in these matters having been reached between the Superintendent of Education of Blount County on the one hand and the Board of Education of Blount County on the other the State Superintendent of Education on October 25, 1938, took cognizance of the situation and by the letter set out above authorized that the salaries of these teachers hereinabove referred to be paid.

It is my opinion that the action of the State Superintendent of Education in this matter, as reflected in his letter of October 25, 1938, is authority for the payment of the salaries of these teachers, and that the same should be paid. It is further my opinion that this decision on the part of the State Superintendent of Education is binding on both the Superintendent of Education of Blount County and the Board of Education of Blount County.

Sections 97 and 152 of the Alabama School Code of 1927, dealing with the educational policy of the County, read, respectively, as follows:

"97. Educational Policy of County.—The County Board of Education shall determine with and on the advice of the County Superintendent of Education, the educational policy of the County, and shall prescribe rules and regulations for the conduct and management of the schools."

"152. Educational Policies.—The County Superintendent of Education, subject to the provisions of this Code, shall recommend for approval and adoption by the County Board of Education, educational policies to promote the educational interests of the County and rules and regulations for the conduct of the schools."

Section 151 of said Code, dealing with the location of schools, reads:

"151. Location of School Buildings.—The County Superintendent of Education, subject to the provisions of this Code, shall recommend for approval and adoption by the County Board of Education, the kind, grade and location of schools to be established and maintained, and the compulsory school attendance districts to be established."

Sections 119 and 159 thereof, dealing with the grading and standardizing of schools, read respectively:

"119. Schools Graded and Standardized.—The County Board of Education shall, upon the written recommendation of the County Superintendent of Education, grade and standardize all the schools under its jurisdiction."

"159. Grading and Standardizing Schools. — The County Superintendent of Education shall prepare rules and regulations for grading and standardizing all public schools of the County, and shall submit same for approval and adoption by the County Board of Education. He shall grade and standardize all public schools of the county, and shall recommend the same for the approval of the County Board of Education."

Sections 118 and 158 thereof, dealing with the courses of study to be taught, read respectively:

"118. Courses of Study.—The County Board of Education shall prescribe, on the written recommendation of the Superintendent of Education, courses of study for the schools under its jurisdiction, and a printed copy of these courses of study shall be supplied to every teacher and to every interested citizen of the County."

"158. Courses of Study.—The County Superintendent of Education shall prescribe courses of study for the schools of the County and submit the same for approval and adoption by the County Board of Education. Printed copies of these courses of study shall be supplied to every teacher and interested citizen of the County."

Sections 117 and 161, dealing with the selection of the teaching personnel, read respectively:

"117. Teachers appointed by County Board.—The County Board of Education shall appoint, upon the written recommendation of the County Superintendent, all principals, teachers, clerical and professional assistants authorized by the board. The County Board may suspend or dismiss for immorality, misconduct in office, insubordination, or incompetency or wilful neglect of duty, or whenever, in the opinion of the Board, the best interests of the school require it, superintendent, principals, teachers, or any other employees or appointees of the Board."

"161. Employees Nominated and Transferred by Superintendent.—The County Superintendent of Education shall nominate in writing for appointment by the County Board of Education, all principals, teachers, and all other regular employees of the Board. He shall assign them to their positions, transfer them as the needs of the schools require, recommend them for promotion, suspend them for cause, and recommend them for dismissal."

It is crystal clear from a reading of the above sections that in all of these matters, that is, the educational policy of the County, the location of schools, the grading and standardizing of the same, the courses of study to be taught, and the selection of teaching personnel, action by the County Superintendent and the County Board of Education, to be effective, must be concurring, and that action on the part of either, without the concurring action of the other, is ineffective, and I so advise you. Consequently, the actions taken by the Board of Education of your County in the above-quoted resolutions, not having been based upon the recommendation of, nor approved or concurred in by, the Superintendent of Education of your County were wholly ineffective. Likewise, the action of the Superintendent of Education of your County in selecting the teachers above-referred to, not having been approved or concurred in by the Board of Education of Blount County, was ineffective. Cf.

**Board of Education of Escambia County v. Watts, 19 Ala. App. 7, certiorari denied Ex parte Watts, 209 Ala. 115.**

Without lengthening this opinion further by here quoting the pertinent provisions of Section 68 of the Alabama School Code of 1927 or the provisions of Section 71 thereof, since they are set out in the letter of the State Superintendent of Education above-quoted, it suffices to say that they are authority for the State Superintendent of Education taking cognizance of and settling this dispute between the Superintendent of Education of your County and the Board of Education of your County, as he did. His decision was that the salaries of these teachers at the Locust Fork School should be paid for the present school year and he authorized that such payment be made. As can be seen from the last sentence of Section 71, supra, this order of the State Superintendent of Education is binding on both the Superintendent of Education of your County and the Board of Education of your County. Therefore, I advise you that the salaries of these teachers should be paid.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 6, 1938.

Hon. J. L. Potts, Sheriff,  
Lauderdale County,  
Florence, Alabama.

**Intoxicating Liquors—Informer's fee assessable on conviction for possession of a still and manufacturing prohibited liquors of each defendant convicted although each conviction grew out of the same transaction.**

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of November 10, 1938, which is as follows:

"We caught two men at a still last year and one of them was tried and convicted for Possession of a still of which we collected \$25.00 distilling fee. The other man was not tried until this last March, 1938, and he was convicted for manufacturing and possession of still both. We want to know if we can collect on this last man since he was convicted for both possessing and manufacturing even though both men were caught together, since there is a fee of \$50.00 for both offenses. If we should collect from him what should the fee be."

In answer to your inquiry, I am of the opinion that the informer's fee is assessable either under Section 4626 of the Code, 1923, (\$50.00 in cases of distilling or manufacturing prohibited liquors) or Section 4659 of the Code, 1923,

as amended by Acts of 1932, p. 200, (\$25.00 in cases of possession of a still), but not both, upon conviction of the second party in question.

In an opinion of this office rendered to the Sheriff of Talladega County on June 4, 1935, it was held that the informer's fee of \$50.00 was assessable under Section 4626, Code of 1923, upon conviction for distilling or manufacturing prohibited liquors; and the fee of \$25.00 is now assessable under Section 4659, Code of Alabama, 1923, as amended by Acts of 1932, p. 200, upon conviction of possession of a still. This ruling was based on the theory that Acts of 1932, p. 200, only amended Section 4659 of the Code, 1923, and did not amend Section 4626, Code of Alabama, 1923. (Biennial Report of Attorney General, 1932-34, p. 553). The opinion rendered to the Sheriff of Talladega County also held that where a party is convicted of both distilling or manufacturing liquors and the possession of a still, only one informer's fee would attach. In such an instance, it is my opinion that the informer's fee would be assessable under either Section 4626, Code of 1923 or Section 4659, Code of 1923, as amended by Acts of 1932, p. 200.

In an opinion of this office, rendered to the Sheriff of Bibb County on September 4, 1935, it was held that the informer's fees in question were assessable on conviction for each defendant convicted although each conviction grew out of the same transaction.

The premises considered, it follows that on conviction of the second party in question, the informer's fee of either \$50.00 or \$25.00 would be assessable. The fact that one party was convicted for the possession of a still would not preclude the assessment of the informer's fee upon conviction of another party for distilling or manufacturing prohibited liquors convicted under facts that grew out of the same transaction.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 6, 1938.

Hon. Thomas J. Arledge,  
Road Supervisor, Chilton County,  
Clanton, Alabama.

Counties—Contract with Tax Collector for rental of his truck to county is void and no recovery can be had thereunder. Since said trucks were rented in case of emergency under facts stated, reasonable reimbursement may be made to said Tax Collector under Section 133, Code of 1923.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge your letter of May 16, 1938, which is as follows:

"On April 9th, 1938 Chilton County was visited by a severe flood and washed out and destroyed approximately one hundred and fifty seven

(157) bridges on roads under supervision of Chilton County. Immediate steps were taken by the undersigned looking to making the roads passable by replacing as many of these washed out bridges as possible. Hon. T. L. McKee, Tax Collector of Chilton County, Alabama owned one truck with a three yard steel dump body, which Road Supervisor needed very badly in the repairing of the bridges and fills which were washed out as above stated. This truck was hired from him at a rate of ninety cents (.90) per hour which is the same rate paid heretofore for trucks of the same capacity and the same rate paid for like trucks during this emergency. I used this truck or rented same from Mr. McKee over a period of about fifteen days and not more. I prepared a bill and approved same to pay Mr. McKee for said truck and the Commissioners Court of Chilton County, Alabama have refused to approve said bill, assigning as the reason for their refusal that Mr. McKee was an official of Chilton County, Alabama, viz: Tax Collector.

"I would like to have your opinion, at your earliest convenience, whether or not Chilton County can legally pay out of Road and Bridge Fund for the rent of this truck.

"Under a Local Act of the Legislature of Alabama, Acts 1936, page 4, the office of Road Supervisor of Chilton County, Alabama was created and his duties and authority is therein set forth and reference is made to said Act in connection with request for your opinion on the above question."

In answer to your inquiry, I am of the opinion that the contract in question is void and no recovery can be had thereunder.

Said contract falls directly within the inhibition of Section 5024, Code of Alabama, 1923, as amended by Acts 1936-1937, page 225, which is as follows:

"That Section 5024 of the Code of 1923 be amended so as to read as follows: '5024. COUNTY OFFICERS INTERESTED IN COUNTY CONTRACTS, OR HIRE OF COUNTY CONVICTS.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract, for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any way pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the County for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers; but this section shall not be construed to prevent the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County from employing, as attorney to such governing body an attorney who holds an office which does not preclude him from practicing law and does not require his full time and for which, as such officer, he is compensated on a per diem or fee basis, nor shall it be construed to prevent the Treasurer in lieu of a County depository from being employed as Clerk to the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County.



"Approved March 2, 1937."

The contract for the hire of trucks is, in my judgment, a contract for services as above set out. In other words, it is a contract for the services of the trucks. (See *Pitts v. Chilton County*, 173 So. 94,95).

Moreover, in my opinion, such a contract would be void as against public policy. **Quarterly Report of Attorney General**, Vol. XII, p. 73. Although this opinion deals with contracts between County Boards of Education and its members, the principles therein set out are applicable to the instant case.

However, due to unusual circumstances under which the trucks in question were rented in view of the then existing emergency, I am of the opinion that the Tax Collector may be reimbursed to the extent of a reasonable rental by the county under Section 186 of the Code of 1923. Said Section provides in part as follows:

"186. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, To reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. \* \* \*"

The county received the benefit of the trucks and should pay a reasonable charge for their use. **Quarterly Report of Attorney General**, Vol. X, p. 133. See also **Quarterly Report of Attorney General**, Vol. VIII, p. 192.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 6, 1938.

Hon. Eugene B. Henry,  
Commissioner of Licenses,  
117 Court House,  
Birmingham, Alabama.

License—A tourist camp is liable for tourist camp license regardless of its displaying sign "This Is Not A Public Tourist Camp."

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of November 2, 1938, which is as follows:

"Mr. E. E. Kelley tells me he has a tract of about five acres of land in the corporate limits of Homewood on which are located some twenty or more cottages that are called 'Hollywood Cottages'. He also owns a tract of land without the corporate limits of the city of Homewood but within its Police Jurisdiction on which are located some twenty or more cottages called 'Birmingham Motor Court'.

"Mr. Kelley rents these cottages, which are furnished, by the day, week or month. He does not advertise as a tourist camp but on the contrary at each place keeps a sign posted reading as follows: 'This is not a public tourist camp'. The owner reserves the right to require references of any applicant and the right to reject any and all applicants.

"These cottages are rented furnished, which includes lights, heat, water and bed linen and in cases where it is desired kitchen utensils and dishes are furnished to the occupants of the cottages for light housekeeping. These furnished cottages are rented to any person the owner approves, whether a resident of the State of Alabama or some other State, but are not rented to any objectionable persons.

"Your opinion is requested as to whether Mr. Kelley is subject to the license imposed on tourists camps in Schedule 142 of the 1923 Revenue laws."

Your inquiry, in my opinion, should be answered in the affirmative. Schedule 142 of Section 348 of the Revenue Act of 1935, is as follows:

"**SCHEDULE 142.** Each person operating a **TOURIST CAMP**, where transient guests are lodged for pay shall be deemed for the purpose of this Schedule, engaged in the business of keeping or operating a tourist camp and shall pay the following license or privilege tax: Each camp containing:

|                                           |         |
|-------------------------------------------|---------|
| Not over 5 beds .....                     | \$15.00 |
| Over 5 and not exceeding 15 beds .....    | 25.00   |
| Over 15 beds .....                        | 35.00   |
| And for each additional bed over 15 ..... | 1.00"   |

It is of no import that Mr. Kelly displays a sign, "This is not a public tourist camp", if in fact he accommodates transient guests.

It is also of no import that Mr. Kelley reserved the right to require references of prospective guests. The courts have long recognized the principle that an innkeeper may make and enforce reasonable rules to prevent immorality and misconduct.—*Dixon v. Hotel Tutwiler Operating Co.*, 214 Ala. 396, 108 So. 26.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 6, 1938.

Miss Loula Dunn, Commissioner,  
Department of Public Welfare,  
Montgomery, Alabama.

Payment by State Department of Public Welfare and county departments held not retroactive so as to infringe ruling of Comptroller General that first payment made to individual for public assistance must be for month in which payment is made.

Opinion by Assistant Attorney General Loeb.

Dear Madam:

I have your letter of November 2, 1938, in which you request my opinion as follows:

"Under date of October 9, 1936, the State Department of Public Welfare received the following letter from the Federal Social Security Board, citing a ruling of the Comptroller General of the United States:

"On September 26, 1936, the Comptroller General of the United States rendered on opinion which affects the amount which states may receive as reimbursement from the United States in respect to public assistance under the Social Security Act.

"The Comptroller General ruled that where a payment by a State to an individual is the first payment which has been made to the individual under the State plan, the Federal Government may match only that part of the State's expenditure which is for the month in which the payment is made. The Federal Government may not, in such cases, match expenditures which are for a period prior to the month in which the initial payment to the individual is made."

"The federal auditors in examination of the books and records of the State Department of Public Welfare for the period beginning February 1, 1936 and ending December 31, 1937, took exception to certain payments made to recipients of Old Age Assistance, Aid to Dependent Children, and Aid to the Blind on the basis of 'Retroactive initial payments made after September 26, 1936'. The foregoing ruling was used as the authority for these exceptions and the total amount charged back to the State was \$1,226.30.

"The facts regarding the payments to which audit exceptions were taken are as follows: Alabama issues warrants to recipients of public assistance at the end of the month for which the grant is made. The county departments of public welfare submit payrolls or requisitions to the State Department of Public Welfare on or about the twenty-fifth of each month representing grants to be paid recipients for the month. The amount of State and Federal funds necessary for matching the local participation is then determined by the State Department and warrants are drawn to the credit of each of the county departments of pub-

lic welfare covering the amount of State and Federal funds due each county. These warrants, together with the local participation funds, are deposited in the local banks and the county departments of public welfare issue checks to the recipients for the approved grant as shown by the monthly requisition. The county departments do not issue checks to individual recipients until they receive the State and Federal Funds.

"During 1936 and the early part of 1937, the delay by some of the counties in submitting the monthly requisitions to the State Department, or the delay in the State Department in sending State and Federal funds to some of the counties, resulted in the warrants reaching the county departments too late for the issuance of checks on or before the last day of the month covered by the payment. Hence, due to the mechanical delays referred to they were issued on or about the first day of the following month. In cases where the payments made were the initial payments to the recipients, the auditors charged back the amount paid which was for the month preceding the month in which the check was dated.

"Your opinion is requested as to whether or not the procedure followed by the State Department and the county departments as hereinabove detailed falls within the condemnation of the above ruling of the Comptroller General."

As I understand your inquiry, the payrolls under dispute were prepared by the county agencies within the time required by the federal authorities in order to permit matching of these funds. However, the formality of issuing the checks was not completed until the following month. It would appear from a reading of the Comptroller General's opinion that it was issued in an attempt to prohibit the state from determining in one month that an applicant for assistance was in need for several months prior to the time of such determination, thus securing federal funds for the purpose of matching state grants for perhaps six to twelve months prior to the time the state formally determined to grant assistance. Such is not the case detailed in your letter of inquiry. In the cases to which exceptions were taken, state and county departments actually determined the need and directed payment for the first month in which payment was made. Everything was done to enable the recipients to receive the awards in the month designated by the awarding authorities with the exception of the purely mechanical procedure of writing and mailing the checks.

In my opinion, "payment" was "made" when, the award having been approved, payment was directed by the awarding authority so that nothing remained but the purely mechanical procedure of writing and mailing the checks. There was no authorized delay in payment and no indication whatsoever of any retroactive effect being given to any decision or order of the awarding authority. The immediate purpose of the Comptroller's opinion, in my judgment, was to forbid any retroactive effect being given to the orders and decisions of the state awarding authority and it is clear from the facts detailed in your inquiry that no such effect could be here implied for the direction of payment was for the present and future, not the past.

You are, therefore, advised that payments to which exceptions were taken did not include months prior to that in which the first payments were made and consequently, there is no infringement of the Comptroller's opinion.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 8, 1938.

Hon. W. W. Hill,  
Judge of Probate,  
Montgomery County,  
Montgomery, Alabama.

Filing Tax—Under facts set out instrument, which is a bond for title, conveying interest in real property, and containing a security for the debt is subject to a deed tax and mortgage tax, as provided in Schedules 46 and 94, Section 348, General Acts of Alabama, 1935. Mortgage tax not collectible from Board of Education of Montgomery County, as it is an instrumentality of the State.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

This will acknowledge your letter of November 29, 1938, with enclosed copy of instrument, which is as follows:

"I am submitting herewith a Sales Agreement entered into by the Board of Education of Montgomery County and the Greeson Manufacturing Corporation in which the said Board of Education agrees under certain conditions to sell the said Greeson certain lands for Five Thousand (5000) Dollars.

"It has been held by this office that this paper was not subject to Deed or Mortgage Tax for two reasons, firstly, the Board of Education placing this agreement on record is not a taxable Agent, and secondly, acting under an opinion of the Attorney General of July 9, 1936, to Hon. Thos. W. Coleman, in which it was held that an agreement to sell is not taxable.

"We are asking for this opinion at once for the reason that our books are in the course of examination and the State Examiner does not agree with the above, but insists that the paper should be taxable and will charge this office up unless we have an opinion from you to the contrary."

The instrument in question is purely a bond for title. The Board of Education of Montgomery County agreed to sell to the Greeson Manufacturing Corporation a certain parcel of realty for \$5000. There was a down payment of \$500, the balance payable in yearly installments and evidenced by promissory notes. Upon payment of said purchase money, the Board of Education agreed to execute a warranty deed to said Greeson Manufacturing Corporation. In the event the vendee failed to fulfill the agreement, the vendor could retain all monies paid as rent of said premises.

It is my conclusion that when such instrument is offered for record, there is due to be paid a deed tax on the cash payment, and a mortgage tax on the remainder, as provided in Schedules 46 and 94, Section 348, General Acts of Alabama, 1935, However, in the instant case, the mortgage tax is not collectible, as the County Board of Education is not subject to taxation.

Said Schedules 46 and 94, are as follows:

"Schedule 46. Deeds, bills of sale, etc. No deed, bill of sale or other instrument of like character which conveys any real or personal property within this State, or which conveys any interest in any such property, \* \* \* shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit: \* \* \* "

"Section 94. No mortgage, deed of trust, contract of conditional sale, or other instrument of like character which is given to secure the payment of any debt, which conveys any real or personal property situated within this State, or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record, to-wit: \* \* \* "

This office has held in an opinion to Hon. W. M. Vaughan, Judge of Probate, Dallas County, dated June 29, 1934, and appearing in Opinions of Attorney General, Volume 17, page 294, that the following instrument was liable for a filing tax:

"A contract for the sale of a lot provides that the purchaser shall pay cash \$100.00 and the balance in equal monthly installments until a certain amount shall have been paid. When the total amount shall have been paid, the seller, will execute the purchaser a deed. The purchaser is put in possession of the property. \* \* \* "

This ruling is based on the reasoning that the instrument conveyed an interest in real property, and, therefore, was subject to a filing tax.

It will be noted that the above referred to instrument is similar in all essential elements to the one in question.

I wish to refer you to the case of **Thompson, Probate Judge, v. Smith, 174 So. 797**. This case determines the filing tax due on a conditional sales contract, but the argument presented is applicable to the proposition here raised. Justice Foster states as follows:

"So that we think, when there is a contract of sale of real or personal property by which either the title is reserved in the vendor as security for the debt, or by which the title passes and what is known as a lien is reserved for that purpose, and such instrument is offered for record, there is due to be paid both the mortgage tax and the deed tax, as provided in Schedules 94 and 46, supra, respectively. \* \* \* "

"A conditional sale of real or personal property conveys an 'interest' in such property as is mentioned in Schedule 46, supra, whether that interest be legal or equitable. The purchaser is regarded as the beneficial owner, and that is an interest.

"It conveys an interest in personal property as the cases we have cited show, and is subject to a deed tax to the extent the purchase price was paid, and a mortgage tax to the extent it was deferred on the basis of the security."

Therefore, it is my opinion that this instrument conveys an interest in property, is given to secure the payment of the debt, and is within the purview of said Schedules 46 and 94.

Since the instrument was given by the Board of Education of Montgomery County, and the security for the debt was for its benefit, it is my conclusion that the mortgage tax should not be collected. The Board of Education of Montgomery County is an instrumentality of the State and is not subject to taxation. Such would be equivalent to the State taxing itself.—**Biennial Report of the Attorney General, 1932-34, page 339.**

The question arises, since said instrument was filed by the Board of Education of Montgomery County, can a deed tax be collected? It is my opinion that this should be answered affirmatively. It is true that the Board of Education of Montgomery County is not taxable, under the reasoning set out above. But, that portion of the instrument which is subject to a deed tax is for the benefit of the grantee, and this tax cannot be evaded by having it filed for record by the Board of Education. There is no provision of law, state or federal, exempting such a deed from the filing tax.—**Biennial Report of the Attorney General, 1926-28, page 680.**

The opinion referred to in your letter is not in point with the proposition here raised, as there were two instruments involved in said case, one being a deed conveying the entire interest, upon which the deed tax was paid, and the other an agreement to sell, which was incorporated in the deed.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 12, 1938.

Hon. Chas. W. Lee,  
State Comptroller,  
Capitol.

Jurisdiction of the Circuit Court where an appeal is taken on a determination by the Board of Review of the assessed valuation of real property.

1. (a) The Circuit Court does not have jurisdiction to render a judgment reducing assessed valuations for a year or years prior or subsequent to the year from which the appeal has been taken.

(b) A judgment by the Circuit Court relating to assessed valuations for tax years other than that for which the appeal was legally taken would be void.

(c) The parties involved in the appeal cannot by consent enlarge the jurisdiction of the Circuit Court.

2. (a) The Circuit Court in a case in which an appeal is taken by a taxpayer from the decree of the Probate Court to sell land for taxes has no jurisdiction to render a judgment reducing the final assessed valuation fixed by the Board of Review where no appeal was taken from such determination by the Board of Review as provided by law.

(b) A judgment so made would be void for lack of jurisdiction.

(c) The parties to the litigation cannot by consent validate such judgment.

3. The Circuit Court does not have the power to render the judgment, on an appeal from the final determination by the Board of Review, waiving interest from the date taxes would have become delinquent under the laws of Alabama, where taxes had not been paid prior to the date of judgment.

4. Under the Revenue Act of 1935, if a judgment by the Circuit Court, in a case appealed from the final determination by the Board of Review on a final assessed valuation, is not rendered until after the date taxes would have become delinquent under the laws of Alabama, the tax collector should collect interest on the taxes from the date that the taxes would have ordinarily become delinquent.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"1. In a case in which appeal was taken to the Circuit Court from final determination by the Board of Review of the assessed valuation of certain real estate for a particular year, as provided for in the revenue laws of Alabama (Acts 1923, p. 152, Sections 59 to 61, and Sections 77 and 78 of the Revenue Act of 1935), and judgment of the Circuit Court was delayed in the case until the close of the succeeding tax year or years, (a) was it within the jurisdiction of the Circuit Court to render judgment reducing the assessed valuations on the same real estate for a year or years prior or subsequent to that year, after the final assessed valuations for such other years had been regularly fixed by the Board of Review from which no appeals had been legally taken to the Circuit Court? (b) Is such judgment void insofar as it relates to assessed valuations for tax years other than that for which appeal was legally taken, on account of the lack of jurisdiction of the Court to determine such valuations in this case? (c) Was the validity of such judgment affected by the fact that the parties in the case consented to the judgment, with respect to such other years?

"2. (a) Was it within the jurisdiction of the Circuit Court in a case in which appeal was taken by a taxpayer from the decree of the Probate Court to sell his lands for taxes, as provided by the revenue laws of this State (Acts 1919 page 182, Section 262, and Section 237 of the Revenue Act of 1935) to render judgment reducing the final assessed valuation



fixed by the Board of Review upon which valuation the taxes were assessed, no appeal having been taken from such determination as provided by law? (b) Is not such judgment void on account of the lack of jurisdiction of the Circuit Court to reduce the assessed valuation in this case? (c) Does the fact that the parties in the case consented to the judgment affect its validity?

"3. Is it within the jurisdiction or discretion of the Circuit Court in a case appealed from the determination by the Board of Review of the final assessed valuation of property of a taxpayer, to render judgment in the case fixing the assessed valuation of the property, and also providing that interest from the date the taxes would have become delinquent under the laws of this State, had there been no such litigation, to the date of the judgment should be waived—the judgment having been delayed until after the delinquent date? Assuming that the taxes had not been paid prior to the date of the judgment.

"4. Under the Revenue Act of 1935, if judgment is not rendered by the Circuit Court in a case appealed from determination by the Board of Review of the final assessed valuation of a taxpayer's property, until the date the taxes would have become delinquent, except for this litigation, under the laws of Alabama, should the Tax Collector collect interest on the taxes computed upon the assessed valuation fixed in the judgment from the date of the judgment or from such delinquent date until date of payment of the taxes?"

1. (a) In reference to the jurisdiction of a court to which an appeal may be taken from the final determination by the Board of Review as to the assessed valuation of real property; the general rule is that whenever the legislature provides for an appeal to a court from the decision of the reviewing board or officer, the court, no matter what may be its grade, is one of limited jurisdiction for that purpose, and must keep strictly within the letter of the statute defining its power. (See 61 C. J. 836).

Under the Revenue Act of 1929, (Section 191) and under the Revenue Act of 1935 (Section 78) the jurisdiction of the Circuit Court to which an appeal may be taken from the ruling of the Board of Review is limited to the ruling on the assessment then made by the Board of Review. The Revenue Act of 1935 (Section 78, Simon) provides specifically:

"All appeals from the rulings of the Board of Review fixing value of property shall be taken within thirty days after the final decision of said board fixing the assessed valuation as provided in this act."  
A similar provision is contained in the 1929 Revenue Code.

Your inquiry 1(a) therefore, must be answered in the negative. Since the jurisdiction of the Circuit Court is only to review and revise the assessment made by the Board of Review for the specific tax year in which the appeal was taken, the court would have no jurisdiction to review or revise the final assessed valuations regularly fixed by the Board of Review for any year prior or subsequent to that year; if no appeal had been legally taken from such other rulings. Further, the Supreme Court (*Marre vs. State*, 200 Ala. 278, 279) has held:

"Each annual assessment of property for taxation is a separate entity, distinct from the assessment for the next and subsequent years.

What may be a proper valuation one year may not be the next year, and thus a judgment decreeing at what figure a piece of property should be assessed last year for the purpose of taxation is not *res adjudicata* as against another valuation placed thereon by the proper authorities this year."

Further, the assessment of the Board of Review after the close of the tax year, becomes final and cannot be set aside or changed in the absence of fraud. (See *State vs. Doster-Northington Drug Co.*, 196 Ala. 447; also *Quarterly Report of Attorney General*, Vol. II, p. 51.)

(b). Therefore, a judgment by the Circuit Court in so far as it relates to assessed valuations for tax years other than that for which the appeal was legally taken would be void for the reason that, as stated above, the court was without jurisdiction to determine such assessed valuations. The only thing that is before the Circuit Court on appeal from the ruling by the Board of Review is that specific ruling and the court does not have jurisdiction to consider an assessment made prior to or subsequent to that specific year.

(c). The parties to the action, the state and the aggrieved taxpayer, cannot by consent enlarge the jurisdiction of the court. As stated above, the court in reviewing the ruling of the Board of Review or other assessing authorities is one of limited jurisdiction created by statute only for that purpose and must keep strictly within the letter of the statute which defines the power of the court and mere consent of the parties would not enlarge that jurisdiction in any way.

2. (a) The jurisdiction of the Circuit Court in a case in which an appeal is taken by a taxpayer from the decree of the Probate Court that land should be sold for taxes is merely to hear and determine that specific question, that is, the validity of the decree of the Probate Court. As stated above, an appeal from the ruling by the Board of Review or other assessing authorities must be taken within thirty days after the final decision of the Board of Review. (Section 190, Revenue Code, 1929; Section 78, Revenue Code, 1935). Therefore, if no appeal was taken, within the time limited, from the ruling of the Board of Review, the taxpayer has waived his right to appeal from that ruling, and the Circuit Court cannot in a proceeding testing the validity of the decree of the Probate Court to sell land for taxes review a ruling as to the assessed valuation of real property fixed by the Board of Review.

(b). The judgment by the Circuit Court would be void for the reason that the Circuit Court did not have the jurisdiction in such other proceeding to review or revise the ruling of the Board of Review.

(c). Further, as stated above, the mere fact that the parties to the litigation consented to the judgment, does not validate the same. I have noted previously that the Circuit Court for the purpose of reviewing a ruling by the Board of Review is a court of very limited jurisdiction and further, consent by the parties cannot under any circumstances enlarge the jurisdiction of the Circuit Court since such jurisdiction must strictly follow the letter of the statute.

The rulings above expressed are substantially the same both under the Revenue Laws of 1929 and the Revenue Laws of 1935.

3. Your next inquiry is as to whether or not the Circuit Court has the jurisdiction in a case where an appeal is taken from the determination by the Board of Review of the final assessed valuation of property, to render a judgment fixing the assessed valuation of the property and to provide that interest from the date the taxes would have been delinquent should be waived; assuming that the taxes had not been paid prior to the date of judgment.

Section 78 of the 1935 Revenue Code (Simon) provides in part as follows:

"Provided that if from all the evidence, the court be of the opinion that the valuation is either too high or too low, it shall render a judgment or decree fixing such valuation as it may deem fit."

Answering the first portion of your inquiry therefore, it will be seen from the above quotation that the court has the authority to render a judgment fixing the assessed valuation of property.

The question presents itself as to whether or not the court has the authority to waive the payment of interest. Section 78, *supra*, provides that where the taxpayer has paid the taxes prior to the commencement of the appeal to the Circuit Court and the Circuit Court fixes an assessment lower than the amount which the taxpayer has already paid, the taxpayer is entitled to a return of the money erroneously paid to the state together with interest from the date of payment. Further, Section 78 provides that if the Circuit Court should fix an assessment greater than that upon which the taxpayer was originally assessed, the taxpayer shall pay the greater amount together with interest from the date of the judgment of the Circuit Court. Also, Section 78 provides that where the taxpayer does not pay the taxes before the same become delinquent, before taking his appeal, he may file a supercedeas bond, "conditioned to pay all taxes, interest and costs to the state, county or any agency or sub-division thereof".

It will be seen therefore, that if the taxpayer pays an amount greater than the court adjudges is due, he is entitled to the return of the money with interest from the date of payment and further, it will be noted that where the taxpayer does not pay the taxes, but posts a bond, the same is conditioned not only to pay the taxes but also interest and costs.

It is therefore my opinion that the Circuit Court being a court of limited jurisdiction, does not have the authority to waive the payment of interest where the taxes are not paid prior to the time when the same would become delinquent under the law. A judgment waiving interest would violate the condition of the bond required to be posted by the taxpayer and in my judgment would exceed the jurisdiction of the court.

4. Under the Revenue Act of 1935, (Section 78, Simon) it is provided that when an appeal is taken from a ruling by the Board of Review, the taxpayer shall pay the taxes due, as fixed for assessment for the preceding tax year, before the same become delinquent. If the taxpayer fails to do so, the court upon motion must dismiss the appeal unless the taxpayer executes a bond in double the amount of the taxes conditioned to pay all taxes, interest and costs which the court shall adjudge to be due.

If the taxpayer does not pay the taxes but files the proper bond, and the judgment of the court is delayed until after the date the taxes would have

become delinquent under the laws of Alabama, it is my opinion that the tax collector should collect interest on the taxes computed upon the assessed valuation fixed in the judgment from the date that such taxes would ordinarily have been delinquent under the laws of Alabama. (See opinion to Hon. W. S. Webb, Tax Collector, Macon County, under date of May 7, 1935.)

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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December 12, 1938.

Hon. O. L. Andrews,  
Clerk of the Circuit Court,  
Jefferson County,  
Birmingham, Alabama.

The Reconstruction Finance Corporation is a Federal Agency and, therefore, cannot be required to pay a library tax as a part of costs imposed in civil cases, both law and equity, placed upon the trial docket of the Circuit Court.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of October 29, 1938, in which you request my opinion as follows:

"On July 5th you rendered us an opinion that the Reconstruction Finance Corporation being a Federal Agency was not required to pay the \$3.00 Trial Tax. We eliminated this item from the cost bills, sending them new bills, and now they say that they are not required to pay the \$1.00 Library Tax. We have informed them that we have no authority to deduct the \$1.00 Library Tax unless we get that authority through the Attorney General, and notified them that we would write for an opinion. I am sure that if they are not liable for the \$3.00 tax that they are not liable for the \$1.00 tax, but I would like to have your authority to deduct this additional tax."

It is my opinion that the Reconstruction Finance Corporation, being an agency of the United States Government would not be subject to the payment of the Library Tax inquired about. A Library Tax is similar to a Trial Tax. (Quarterly Report of the Attorney General, Volume II, page 47.) It has been held by this office that Federal Agencies are not liable for the payment of the Trial Tax. (Quarterly report of the Attorney General, Volume III, page 213.)

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 13, 1938.

Hon. Woolsey Finnell,  
Tax Collector,  
Tuscaloosa County,  
Tuscaloosa, Alabama.

In the collection of escape taxes, Tax Collector should collect interest only after assessment is made final.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of October 26, 1938, requesting my opinion as follows:

"Should a Tax Collector collect interest on escape tax, i.e.:

" 'A' does not assess his tax for 1935, 1936, 1937 and 1938. The Assessor makes the assessment during 1938, and, of course, adds a 10% penalty. Should I collect interest from 1935 to date, or only after the assessment is made final?"

In my opinion, in the collection of escape taxes assessed during the year 1938 for the years 1935, 1936, 1937, 1938, the Tax Collector should collect interest only after the assessment is made final.

Section 45 of the General Revenue Act of Alabama, 1935 (General Acts of Alabama, Regular Session 1935, page 280) after providing for the assessment of escape tax, and providing for a penalty of ten per cent thereon for each year, makes provision with reference to the time when such tax shall become due in language as follows:

"Whenever escape assessment is made final, the tax shall immediately become due and the assessor or deputy assessor shall forthwith certify the assessment to the Collector, who shall forthwith collect the same, \* \* \* "

Section 166 of the same Act (General Acts of Alabama, Regular Session, 1935, page 337) provides for interest to be paid in connection with tax in language as follows:

"Section 166: All tax becoming delinquent, bear interest at the rate of six per cent per annum; and the interest must be added to such collection as a part of the tax, and reported in such manner as the State Comptroller may prescribe."

Thus, it will be seen, that escape taxes do not become due until the assessment is made final, and no interest is due on tax until the same becomes delinquent

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 14, 1938.

Hon. A. H. Collins,  
Superintendent of Education,  
Capitol.

Schools — Storage of free textbooks—

County governing body may provide storage space for free textbooks and make payment therefor from general funds of the county.

County board of education may provide storage space for free textbooks and make payment therefrom county school funds.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"The efficient administration of the Free Textbook Law (Acts 201, approved July 17, 1935) has made it necessary for county superintendents of education to store and handle large quantities of school books. The quarters now occupied by some superintendents are not sufficiently commodious for storing and handling of the textbooks needed for use in their schools.

"In view of this situation, I shall appreciate your advising me at an early date whether paragraph 169 of the Alabama School Code of 1927 makes it the duty of the County Boards of Revenue or Courts of County Commissioners to furnish to county superintendents of education quarters ample for proper storage and handling of state adopted free textbooks."

In my opinion, your inquiry should be answered in the negative.

It is true that Section 169 of the Alabama School Code of 1927 makes it the duty of the county governing bodies of the several counties to furnish to the county superintendents of education ample, convenient and comfortable office quarters. This relates to the office quarters for the performance of the duties of office, and has no relation to furnishing storage space for free textbooks.

However, the county governing body, if it chooses so to do, may appropriate monies from the general fund for the purpose of providing a place for the storage of such free text-books.

Section 452 of the Alabama School Code of 1927, provides:

"County and City May Assist in Purchasing Books. — County Boards of Education, City Boards of Education, the Courts of County Commissioners and other like governing bodies of the Counties or Municipalities, shall have power and authority to appropriate funds for the pur-

pose of purchasing textbooks for free distribution or for rental to the patrons of its public schools under such rules and regulations as shall be prescribed by the respective County Boards of Education or City Boards of Education "

This provision, by necessary implication, affords ample authority to the county governing body to provide storage space for free textbooks and to pay for the same from general funds. But, in the event the county governing body does not elect to provide for the same, the county board of education is authorized thereby to provide such storage space and to make payment therefor from school funds.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 14, 1938.

Hon. R. F. Lyon,  
County Treasurer,  
Shelby County,  
Columbiana, Alabama.

1. Sheriffs' Fees — The fee of \$2.00 allowed for each day's attendance by the sheriff on the county court, by virtue of Section 3758, Code of Alabama, 1923, is a proper claim against the county.

2. Sheriffs' Fees — The fee of \$2.00 to which sheriffs are entitled for attendance each day on the circuit court, under Section 3741, Code of Alabama, 1923, is a proper claim against the General Fund of the County.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

This will acknowledge your letter of October 7, 1938, which is as follows:

"Under Section 3758, Code of 1923, Sheriffs are allowed \$2.00 for attending regular terms of the County Court. The Code does not specify that it is a claim against the County

"1. Will you kindly advise me, officially, if this is a proper claim against the County?

"In an opinion by Mr. Haynes (Vol. III, April-June, 1936), he says, 'Answering your fourth inquiry, I call your attention to Section 3758, Code of Alabama, 1923, where it says,

"For each day's attendance by the Sheriff upon such court, \$2.00."

However, he does not say that it is a proper charge against the County.

"Fees for Sheriffs 3741-3750, Code 1923.

"For summoning jury in capital cases, or at any special court for the trial of criminal to be paid out of the county treasury . . . \$5.00.

"For attendance each day on such court to be paid by the county . . . \$2.00"

"The Sheriff of this county claims and is being paid by the county \$2.00 for every day's attendance upon regular terms of the Circuit Court, criminal division.

"2. Will you kindly advise me if this is a proper claim against the General Fund of this county?"

"I find many rulings on this Section where capital cases or special terms for trying criminals are involved but none for attending 'Regular terms of the Circuit Court,' criminal division."

1. In answer to your first inquiry, I wish to inform you that in an opinion to Hon. A. H. May, Sheriff, Houston County, Dothan, Alabama, dated April 16, 1935, and appearing in Opinions of the Attorney General Office Edition, Vol. 3-A, at page 188, this office held that "the \$2.00 attendance fee provided for the Sheriff is to be paid by the County, and cannot be taxed as costs against defendants in each case." This ruling is based on the reasoning that Section 3758, Code of Alabama, 1923, merely adopts Section 3741, Code of Alabama, 1923, in so far as the same can be made to apply to fees for services in the county court, and since said Section 3741 provides said fee "to be paid by the County," the same is incorporated into Section 3758. Therefore, it naturally follows that the fee of \$2.00 allowed for each day's attendance by the sheriff on the county court is a proper claim against the county.

2. It is my conclusion that your second inquiry should be answered affirmatively.

In the case of Weaver et al. v. Tidwell, County Treasurer, 223 Ala. 169, 153 So. 218, the Court in construing Section 7285 of the Code of Alabama, 1923, states as follows: "Section 7285 of the Code of 1923 provides for the compensation of the probate judges for services rendered in connection with roads 'to be paid out of the county treasury,' meaning, of course, out of the general fund." (Emphasis supplied).

Section 3741 of the Code of Alabama, 1923, provides: "For attendance each day on such court to be paid by the county \* \* \* " The words to be paid by the county are certainly analogous with the above cited 'to be paid out of the county treasury.' Therefore, it is my opinion that the fee of \$2.00



to which sheriffs are entitled for attendance each day on the circuit court, under Section 3741, Code of Alabama, 1923, is a proper claim against the general fund of the county.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 15, 1938.

Hon. Chester Walker,  
Judge of Probate,  
Tuscaloosa County,  
Tuscaloosa, Alabama.

Licenses—

Schedules 55 and 121 of Section 348 of the Revenue Act of 1935 construed — Cafe — Dance Hall Licenses — Business advertising and operated as a cafe, whenever provisions are made for dancing held required to purchase both cafe and dance hall licenses.

Opinion by Assistant Attorney General Small.

Dear Sir:

Under date of October 20, 1938, you requested my opinion as follows:

"Please interpret for me Schedule No. 55 of the Revenue Code of 1936 as compiled by Harry Simon regarding the license to be paid for operating a dance hall.

"The question I desire you to answer is this, 'A small cafe with a few extra feet of floor space has located in it a music instrument known as a phonograph on which the license to operate the machine has been paid also the license to operate the cafe has been paid. The floor space is very small and will not accommodate more than two or three couples at the same time for dancing purposes. The main business and the advertised business is the operation of a small cafe. It does not matter to the cafe operator whether or not his customers engage in dancing, however, he does not feel justified in prohibiting some of his customers from dancing if they so desire. No admission is charged for coming into this place of business. The only financial remuneration the operator receives is from the sale of his food and drinks.' Please give me your opinion as to whether or not the operator of a small business as described above should be charged a license for operating a dance hall as defined in Schedule No. 55."

In reply I wish to advise you that the answer to your request necessarily compels consideration of both Schedules 55 and 121 of Section 348 of the Revenue Act of 1935.

Schedules 55 and 121 cited supra provide as follows:

"SCHEDULE 55. Every public DANCE HALL, whether or not a charge is made for dancing and whether operated in connection with any other business or not, shall pay the following privilege or license tax: In incorporated cities and towns or within the police jurisdiction thereof, twenty-five dollars (\$25.00). In all other places whether incorporated or not, thirty dollars, (\$30.00)."

"SCHEDULE 121. Every place commonly known as a ROAD HOUSE, NIGHT CLUB, PUBLIC DANCE HALL, or place by any other name, where the general public is permitted to dance, whether a charge is made or not made therefor, within incorporated cities or towns or within the police jurisdiction thereof: Twenty-five Dollars (\$25.00). In all other places Fifty Dollars (\$50.00)."

In my opinion, the operators of the businesses described by you in your request must pay a license for operating a dance hall as well as a cafe license.

In my judgment, the very circumstances involved here definitely require a license for a dance hall. You state that a phonograph is placed in the cafe and that a "few extra feet of floor space," is provided. You further state that this extra floor space is used by customers for dancing. In my judgment, the fact that the operator of the cafe receives no remuneration from any source other than his food and drinks, is not material to the requirements of the licensing statutes quoted above.

Construing the above licensing statutes most favorably to the taxpayer, as is the rule laid down by our Supreme Court, (See case of *State v. Dr. Pepper Bottling Co.*, 155 So. 93, 228 Ala. 607) and the further ruling that a license to operate a business includes all things material to or constituting an integral part of such principal business (See *State v. Dr. Pepper Bottling Co.*, supra) yet the businesses here concerned are entirely separate and fall squarely within the provisions of the licensing statutes above cited.

The amount of floor space devoted to dancing, and the fact that no charge is made therefor, do not in my opinion offer encouragement or immunity to the licensing statutes herein cited.

The premises considered; it is my opinion that a cafe and a dance hall license must both be paid for the operation of the business you describe. In my judgment, whatever else may be the purposes for which the said business is operated, and regardless of by what name the place may be advertised or known, it is in last analysis a dance hall within the meaning and the very stated terms of the above quoted licensing statutes.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 15, 1938.

Hon. L. J. Lawson, Sr.  
County Treasurer, Hale County,  
Greensboro, Alabama.

Highways — Rights-of-Way — Hale County may transfer proceeds of general obligation bonds issued "for the construction of highways in the county" to the gasoline tax fund to be used for the purpose of securing rights-of-way for said roads.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of December 12, 1938, which follows:

"The Court of County Commissioners of Hale County, on or about October 15, 1937, passed a resolution calling for an election to be held in Hale County for the purpose of deciding whether or not said county should issue bonds in the amount of one hundred thousand dollars (\$100,000) for the purpose of 'providing for the construction of highways in the county, the period of usefulness of which highways is hereby determined to be more than twenty-five years.' A copy of this resolution is attached hereto and made a part of this letter.

"On December 12, 1938, the Court of County Commissioners of Hale County passed a resolution authorizing the transfer from the fund into which the proceeds of the bond issue heretofore referred to had been paid to the Gasoline Tax Fund, of the sum of money in the amount of twelve thousand five hundred dollars (\$12,500), to be used for the payment of rights-of-way on roads under contract with the State Highway Department in Hale County. A copy of this resolution is hereto attached and made a part of this letter.

"As Treasurer of Hale County, I respectfully request your opinion as to whether or not I can legally transfer from the Bond Issue Fund the sum of \$12,500 to the Gasoline Tax Fund, for the purpose above set out.

"This question is of vital importance to the county at this time, and I, therefore, most respectfully beg of you that an early opinion be forthcoming."

The resolution of the Commissioners' Court of Hale County calling the election pursuant to which the bonds for \$100,000, described in your letter of inquiry, were issued follows:

"RESOLVED, that pursuant to the Municipal Bond Code approved September 10th, 1927, and Act supplemental thereto and amendatory thereof, the Court of County Commissioners of Hale County, Alabama, hereby orders an election to be held in said County Tuesday, November the 23rd, 1927, for deciding whether or not the Bonds of the County shall be issued in the amount of \$100,000.00 bearing interest at not exceeding

five per cent per annum, payable semi-annually and maturing February 1st, \$5,000.00 in each of the years 1940 to 1959, inclusive for the purpose of providing for the construction of Highways in the County, the period of usefulness of which highways is hereby determined to be more than twenty five years."

The resolution of the Commissioners' Court of Hale County authorizing the transfer of \$12,500.00 of the proceeds of this \$100,000.00 bond issue from the road building fund or bond issue fund to the gasoline tax fund for the purpose of securing rights-of-way for roads for the construction of which Hale County has already entered into a contract with the State Highway Department, and providing for the refund of this \$12,500.00 from the gasoline tax fund to the road building fund or bond issue fund upon demand by the State Highway Department, is as follows:

"On Motion of Commissioner J. F. Bishop, seconded by Commissioner M. J. Crawford, a resolution is offered to transfer from the Road Building Fund (Bond Issue Fund) to the Gasoline Tax Fund the sum of \$12,500.00 for payment for Rights-of-way on roads under contract with State Highway Department in Hale County. This amount to be refunded from the Gasoline Tax Fund to the Road Building Fund when demanded by the State Highway Dept. of Alabama. The Probate Judge R. K. Greene is authorized to draw a warrant on the Road Building Fund for \$12,500.00 to be deposited to the credit of the Gasoline Tax Fund for purposes of paying for Rights-of-way only.

"On roll call the vote was unanimous."

We also have before us a copy of the contract which Hale County has entered into with the State of Alabama for the construction of certain roads in Hale County. Pertinent excerpts from this contract are as follows:

"1. That the county will contribute one fourth of the cost pertaining to the improvement and placement of a Double Bituminous Surface Treatment on the following roads in Hale County: it being understood that the County will not pay more than \$100,000.00

\* \* \*

"And it is further agreed that the County's contribution toward the cost pertaining to the improvement and placement of a Double Bituminous Surface Treatment on the above described roads, will be made in cash to the State as the work progresses, i. e.: the County will pay one fourth of the Contractor's current estimates as they become due, the final contribution to be made upon final acceptance of the road by the State Highway Department, which total contribution shall not exceed \$100,000.00.

\* \* \*

"5. That all rights of way within the city limits are to be provided by the cities and all rights of way outside of the city limits of the several incorporated towns are to be provided by the County and the cost of same is not to be considered as participation in the cost of the projects."

You will note from the above that there is nothing whatever in the resolution of the Commissioners' Court of Hale County authorizing the elec-

tion pursuant to which the general obligation bonds of the County, described in your letter, for \$100,000.00, were issued, providing that the proceeds shall be used to match State or Federal funds to be expended in Hale County for road construction purposes. The only provision in regard to the purpose for which the proceeds of these bonds are to be used is that they are to be used "for the purpose of providing for the construction of highways in the County, the period of usefulness of which highways is hereby determined to be more than twenty-five years."

The above-quoted excerpts from the contract which has been entered into by and between the State of Alabama and Hale County for the construction of certain roads in Hale County, which are all of the pertinent excerpts of said contract, do not provide from what source this \$100,000.00 which Hale County thereby agrees to pay toward the cost of this road construction shall be paid.

Consequently, there is nothing in the resolution of the Commissioners' Court of Hale County authorizing the election pursuant to which these bonds were issued or in the contract which Hale County has entered into with the State of Alabama for road construction in Hale County which will prevent the use of \$12,500.00 of the \$100,000.00 proceeds of this bond issue for the purpose of securing rights-of-way for the roads to be constructed.

Therefore, the only remaining question is whether or not there is legal authority for such use of a part of the proceeds of this bond issue. It is the statutory duty of the Counties to secure, at their expense, the rights-of-way deemed necessary by the State Highway Department for roads or bridges constructed by the State Highway Department in the respective Counties. **Section 1397 (33), Michie's Code of 1928**, which is a codification of the 1927 Act known as the Alabama Highway Code, provides as follows:

"1397 (33). Right of way for roads; how acquired — The right of way deemed necessary by the State Highway Department for a road or bridge constructed under the provisions of this article shall be acquired by the county in which such road is to be located, without expense to the State. Should the county fail or refuse to acquire the necessary right of way, the state through the State Highway Department shall have authority at the expense of the county to acquire such right of way, either by purchase or by the exercise of the right of eminent domain in condemnation proceedings, as is provided for under the laws of this state."

This office in an opinion to Hon. J. M. Money, Judge of Probate, Jackson County, Scottsboro, Alabama, under date of September 15, 1932, Biennial Report of Attorney General, 1930-1932, page 1017 held that moneys derived from the State excise tax on gasoline, which said moneys were to be used exclusively for the construction and maintenance and policing of the public roads in the respective Counties, could be legally expended for the purchase of rights-of-way, on the theory that a right-of-way must be obtained before a road can be built and the procuring of such right-of-way is incidental to the construction of the road and is a part thereof.

For the same reason, we held in an opinion to Hon. Marvin Pearce, Member, Court of County Commissioners, Marion County, Winfield, Alabama, under date of July 11, 1935, Office Edition Book 5-A, page 125, that moneys in the road and bridge fund of the County could be used for the purpose of securing rights-of-way.

The holding of both of the above opinions were reaffirmed by this office in an opinion to Hon. J. Percy Oliver, Judge of Probate, Talladega County, Dadeville, Alabama, under date of January 29, 1936, Quarterly Reports of Attorney General Vol. II, page 82.

On the basis of the reasoning used in those opinions, it is my opinion that \$12,500.00 of the proceeds of the \$100,000.00 bond issue described in your letter of December 12, 1938, may be transferred to the gasoline tax fund of the County to be used for the purpose of securing rights-of-way for roads to be constructed in said County, inasmuch as the bonds were issued "for the construction of highways in the County," and as held in the above-cited opinions, rights-of-way are incidental to the construction of roads and are a part thereof.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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December 15 1938.

Hon. Henry S. Long, Chairman,  
State Tax Commission,  
Capitol.

State Tax Commission — Motor Vehicles — Mileage Tax — Motor  
Vehicle License.

The State Tax Commission has the authority to enter into reciprocal agreements with agents of other states regulating the operation of motor vehicles licensed by one contracting state over the highways of the State of Alabama, with reference to the motor vehicle license and mileage tax under the authority of General Acts 1936, p. 208, amending Schedule 158.15, Section 348, Revenue Code of 1935.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date to which are attached copies of reciprocal motor vehicle agreements between the State of Alabama and the States of Georgia, Arkansas, Tennessee, Mississippi, Louisiana, Florida, South Carolina, North Carolina and Virginia; duly executed by the State Tax Commission of Alabama in accordance with an Act of the Legislature approved April 21 1936, as found in the General and Local Acts of the Extra Session 1936, p. 208. You further state that a question has arisen as to the power and authority of the State Tax Commission of Alabama, to execute these agreements in view of the fact that the agreements in substance seem to provide for repeal to a certain extent of valid existing statutes previously passed by the Legislature of Alabama.

You further call my attention to provisions in the above mentioned reciprocal agreements which provide that the State of Alabama shall waive the duly enacted mileage tax and which provide that motor vehicles properly operating in the other states shall be allowed to operate upon the public highways of the State of Alabama without the purchase of Alabama license plates or the payment of any mileage tax or motor vehicle fees of any kind or nature whatsoever. You then request an opinion as to the power and authority of the State Tax Commission to enter into the agreements above specified.

The authority to enter into the above named "Reciprocal Agreements" is contained in Schedule 158.15 of the 1935 Revenue Code as amended by General Acts 1936, p. 208, which provides in part as follows:

"The State Tax Commission of Alabama is hereby authorized to make reciprocal agreements with other states for an exchange of rights for the operation of motor vehicles **that will be considered as a fair exchange of rights and privileges.** The said rights and privileges to be in effect as long as both contracting parties recognize the rights of the other. The above reciprocal agreement can be annulled on a notice issued to either party by the other party thereto within thirty (30) days thereafter. (Emphasis ours)."

It is my opinion that these reciprocal agreements do not abrogate the statutes of Alabama levying mileage taxes on motor vehicles nor the statutes levying a privilege license in the form of a license tag. You will note that in the above quoted provision of the law, the legislature granted to the Tax Commission the specific authority to enter into reciprocal agreements that "will be considered as a fair exchange of rights and privileges." The authority to enter into these reciprocal agreements between states has been recognized by the courts. (*Kane v. New Jersey*, 242 U. S. 160). Further, there is no constitutional inhibition contained in the Constitution of the State of Alabama preventing the State Tax Commission from entering into these reciprocal agreements.

A further objection might be raised to the effect that the legislature is in a measure delegating to the executive branch of the government, the right to grant exemptions from taxation. It is a primary proposition of the law that a legislature does not have the power to delegate to the executive branch of the government the right to grant exemptions from taxation since the taxing power is solely vested in the Legislature, therefore, the right to grant exemptions can only be exercised by the taxing power. It is my opinion though that this is not a valid objection to the right of the State Tax Commission to enter into reciprocal agreements with other states in reference to the operation of motor vehicles. The mileage tax levied and the fee for a license plate is not levied under the taxing power of the state. A mileage tax, as is the license tax, are imposed by the state as a toll for the use of the highways and are imposed under the police power of the state and it has been held that it is immaterial whether the imposition is a flat tax or a graduated tax. In fact all tolls for the use of highways has been fully recognized by many courts as impositions under the police power of the states as distinguished from the taxing power. (*State v. Public Service Commission of Wisconsin*, 242 N. W. 266; *Grolbert v. Oklahoma Tax Commission*, 60 Fed. (2) 293; *Minnesota Rate Cases*, 230 U. S. 352; *Hendrick v. Maryland*, 235 U. S. 610):

Therefore, the legislature in granting to the Tax Commission, the right to enter into reciprocal agreements with other states is not delegating to the executive arm of the government the right to grant exemptions from taxation.

Further, this office held in an opinion found in Quarterly Reports of the Attorney General, Vol. VI, p. 50, that the legislature had the right to permit the State Tax Commission to enter into reciprocal agreements regulating the operation of motor vehicles over the highways of this state with reference to the license tags.

The United States Supreme Court in a very recent opinion stated that a state has the right to extend to non-residents of the state a privilege in reference to the operation of motor vehicles and may limit the concession in any reasonable manner. It is not specifically necessary that the concession and extension of privileges to non-residents of the state be contained in a statute. It is my opinion that the legislature may delegate to an administrative board the right to make these concessions in a reasonable manner, which in my opinion, has been done by our statute. (General Acts 1936, supra). In *Kane v. New Jersey*, supra, at p. 167, the court stated:

"The Maryland law contained a reciprocal provision by which non-residents whose cars are duly registered in their home state are given, for a limited period, free use of the highways in return for similar privileges granted to residents of Maryland. Such a provision promotes the convenience of owners and prevents the relative hardship of having to pay the full registration fee for a brief use of the highways. It has become common in state legislation; and New Jersey has embodied it in her law since the trial of this case in the lower court. But it is not an essential of valid regulation. Absence of it does not involve discrimination against nonresidents; for any resident similarly situated would be subjected to the same imposition."

It is therefore, my studied conclusion that the State Tax Commission, under the authority of Schedule 158.15 of the 1935 Revenue Code, (as amended by General Acts 1936, p. 208) has the power to enter into reciprocal agreements with other states in reference to the operation of motor vehicles over the highways of the State of Alabama owned and operated by non-residents of this State. The only remaining question is as to whether or not the State Tax Commission entering into these agreements received that which "would be considered as a fair exchange of rights and privileges," (supra). This is a question of facts, which by statute, is left within the discretion of the State Tax Commission. This opinion is merely limited therefore to deciding the question as to whether or not the State Tax Commission had the power to enter into the agreements which you submitted for my consideration.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.



December 17, 1938.

Hon. T. C. Almon,  
Judge of Probate of Morgan County,  
Decatur, Alabama.

A chief clerk in the office of Probate Judge, performing duties of Probate Judge by reason of vacancy having occurred in that office as provided in Section 9594 in the Code of Alabama, 1923, is entitled to fees received in the performance of such duties in his or her own name as Clerk of the Probate Court.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter wherein you request my opinion as follows:

"B. L. Malone, Probate Judge of Morgan County, Alabama, was tried and impeached on October 24, 1938. The order of the Supreme Court ousting him from the office of Judge of Probate was dated as of October 25, 1938.

"Section 9594 of the Code of Alabama reads as follows:

" 'Chief Clerk continues to perform duties of office pending vacancy, etc.

" 'Whenever a vacancy shall occur in the office of the judge of probate, the chief clerk in that office, appointed and qualified as authorized by law, shall, during such vacancy and until the qualification of a lawful successor, perform all the duties of that office, which he is authorized by law to perform when there is no vacancy, but must not receive money on decrees or executions, or become the custodian of trust funds pertaining to the Court. He may make all necessary orders for the continuance of causes and proceedings pending in the court. All such duties are to be performed, during such vacancy, by such chief clerk in his own name as clerk of the probate court, and he is entitled to the lawful fees therefor. For his official acts hereunder, such chief clerk and the sureties on his bond to the judge of probate, shall be liable to persons injured, according to the legal effect of official bonds as described by statute. If such chief clerk shall fail or refuse on demand to deliver all the books, papers, property, and money belonging or appertaining to such office, to the lawfully qualified successor of the judge of probate he may be proceeded against under the provisions of this Code to compel the delivery of books, papers, property and money by public officers to successors.'

"Miss Clovis Babler was the chief clerk in the probate office who had been duly appointed and qualified and as such, performed the duties of the office as the above section authorized.

"On November 4, 1938, Governor Graves appointed me to the office of Probate Judge of Morgan County, Alabama. On Monday November

14th, the Board of Revenue met. I took the oath of office, presented my bond, which was approved, and filed in the office of the Circuit Clerk of Morgan County, Alabama, about 11 A. M. My commission was signed by the Governor and delivered to me as probate judge at 4 P. M. on Monday, November 14th. In other words, I took the oath of office, my bond was approved and commission issued on the 14th of November, 1938.

"Section 2579 of the Code reads as follows:

" 'Commissioned officers—The judges of the several courts, the attorney-general, the solicitors, the secretary of state, the auditor, the state treasurer, the superintendent of education, the commissioner of agriculture and industries, commissioners of conservation, the public service commissioners, the tax commissioners, the clerk of the supreme court, the clerks of the circuit courts, the sheriffs, the tax assessors, tax collectors, the county treasurers, the county commissioners, the justices of the peace, the constables and notaries public, before entering upon and exercising the duties of their respective offices, must obtain a commission.'

"This section requires that a commission be issued before I enter upon the duties of the office of Judge of Probate.

"Section 2714 reads as follows:

" 'Succeeding officer entitled to salary for day change takes place—The succeeding officer is entitled to the salary for the day upon which he is inducted into office, to the exclusion of the retiring officer.'

"After I made my bond and took the oath of office I told Miss Babler, the Chief Clerk, that I thought I would be entitled to the fees of the office after this was done but that I wanted to get a ruling from you on this question. On Monday, November 14th, Miss Babler and I agreed to call you for a ruling. I placed a call for you at your office in Montgomery but was advised that you were in Birmingham.

"Mr. E. T. Hammerly, State Auditor, is here now, auditing the books of the Probate Judge's office. We discussed this matter with Mr. Hammerly and he attempted to call Mr. C. W. Lee, State Comptroller, but was unable to get him on the 'phone, but he did talk with Mr. J. P. Shaffer, Assistant State Comptroller, and Mr. Shaffer told Mr. Hammerly to check Miss Babler out as of the 14th of November and me in the office as of the 15th of November.

"November 14th was the last day for the payment of automobile and privilege licenses, and naturally, the biggest day the office has in the entire year. If Miss Babler is entitled to the fees for the day of November 14th in its entirety or a part of November 14th, then I want her to have these fees, to which she is justly entitled. If by virtue of my taking the oath, my bond approved and commission being issued to me on the 14th day of November, this entitles me to the fees of the office that day, naturally I want these fees. The matter is perfectly friendly between Miss Babler and me, each of us only desiring the fees to be paid as the law directs in such cases.

"Will you please give me your opinion on the following point:

"Where a vacancy occurs in the office of the Judge of Probate and the Chief Clerk of the Probate Court is acting and an appointment has been made and the new Probate Judge takes the oath of office, has his bond approved and commission issued on the 14th day of November, which, in your opinion, would be entitled to the fees of the office for that day.—The Chief Clerk or the Probate Judge? I might also state it in this way:

"Where a vacancy occurs in the office of the Judge of Probate and appointment has been made and the Chief Clerk has been performing the duties of the office and where the person appointed to the office of Probate Judge qualified at 11 A.M. on November 14, 1938, by taking the oath of office, filing and having his bond approved and commission issued at 4 p.m., would the Probate Judge be entitled to all or any part of the fees for that day or would the fees belong to the Chief Clerk and the Probate Judge's tenure begin on the 15th of November?

"I know that Section 2714, which I have cited above, states that the succeeding officer is entitled to the salary on the date upon which he is inducted into the office to the exclusion of the retiring officer. I also know that there is a rule of law, which I cannot put my hand on right now, that is in substance that the law doesn't recognize any part or parcel of a day. I know this would govern where a duty was required to be performed on a certain day. I don't believe it would conflict with the code section which I have cited.

"Miss Babler, throughout the day, signed all receipts as Clerk of the Probate Court but after I took the oath and my bond was approved, she made notations so that the receipts of the office could be determined from that time.

"Will you please give me your opinion on this matter at your very earliest convenience as it is of vital interest to both Miss Babler and me and we have agreed to abide by your opinion and we want to clear up the matter as soon as possible."

In my opinion, under the circumstances outlined in your inquiry, the Chief Clerk performing the duties of the office would be entitled to receive the fees which came into the office on the 14th day of November, 1938.

In your inquiry you quote Section 9594 of the Code of Alabama, and your attention is called to the provisions in that Section as follows:

"All such duties are to be performed, during such vacancy, by such Chief Clerk in his own name as Clerk of the Probate Court; and he is entitled to the lawful fees therefor. For his official acts hereunder, such Chief Clerk and the sureties on his bond to the Judge of Probate, shall be liable to persons injured, according to the legal effect of official bonds as described by statute."

In your letter you state that Miss Babler "throughout the day, signed all receipts as Clerk of the Probate Court \* \* \* ". In such case, in my opinion, she would be entitled to receive the fees therefor, as provided for in said

Section 9594; and, she and the sureties on her bond to the Judge of Probate, and not you and the sureties on your bond would be liable to answer to any persons injured in connection with the manner of the performance of such duties. This conclusion is in accordance with the theory on which fees are allowed for public officers, that is, for the performance of a service. The Chief Clerk performed the services in her own right and the fees allowed for the services should go to her.

In addition to the above, you state in your letter that your commission was signed by the Governor and delivered to you as Probate Judge at 4:00 P. M. on Monday, November 14th; and, you quote Section 2579 of the Code of Alabama, 1923, relating to commissioned officers, of which the Probate Judge is one, said section providing to the effect that officers required to obtain a commission must obtain the same before entering upon and exercising the duties of their respective offices. Then, you would not have been qualified to exercise the duties of Probate Judge of Morgan County before 4:00 P. M. on Monday, November 14th. There is a statute in the State of Alabama providing for the office of the Judge of Probate to be kept open for the transaction of business on every day, except Sundays, and legal holidays, from 9 in the morning until 4 in the afternoon (Section 9577 of the Code of Alabama, 1923). This section in my opinion would establish the period from 9 o'clock in the morning to 4 o'clock in the afternoon as the legal day for the Probate Offices of the several counties of the state; and, in view of the fact that your commission was not issued and delivered to you until the end of the legal day provided for in that office, then, you could not legally assume the duties of the office until the following day.

Section 2714 of the Code of Alabama mentioned in your inquiry has no application in the instant case as said section is applicable only to salaried officers.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

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December 22, 1938.

Hon. G. W. Cuninghame,  
Register, Marengo County,  
Linden, Alabama.

Register in Chancery not entitled to commission on money collected from (1) confiscated gambling devices, or from (2) per diem fee collected for services of court reporter.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"Will you please advise me whether or not in your opinion the Register in Chancery is entitled to the usual 5% of money obtained from

slot machines, one-half of which goes to the officer making the capture, and the other half to the general fund of the county.

"Also advise me whether or not the Register in Chancery is entitled to the 5% in cases where collections are made for court reporter in case heard in the office of the Register in Chancery at the rate of five dollars per day, and which also goes to the general fund of the county."

Both of the questions above presented must be answered in the negative.

The legislature provided that the money and other property taken from a confiscated gambling device must be paid to the officer making the seizure and to the general fund of the county, share and share alike, after deductions of court costs authorized by the court to be paid therefrom. Act No. 671, General Acts of 1931, page 806.

Section 6738, Code of Alabama, 1923, authorizes a tax of \$5.00 as a part of the costs of a case "for each day or fraction thereof" that such (the court) reporter shall be engaged in reporting a case, and requires that such fee, when collected, shall be paid by the clerk into the county treasury of the county in which the case is tried.

I am unable to find any legal authorization for you to deduct any commission from money collected by you from either of the above sources.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 22, 1938.

Hon. P. A. McDaniel, Jr.,  
County Superintendent,  
Barbour County,  
Clayton, Alabama.

Schools —

Telegrams sent by County Board of Education paid for by Court of County Commissioners.

Officer entitled to full statutory salary regardless of whether or not he draws it in equal monthly installments.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of August 6th which is as follows:

"Does the County Board of Education have legal authority to pay from the public school funds of the county bills for telegrams made by county superintendent in the course of official school business?"

"Does the county superintendent of education have legal authority for writing his name on the calendar pay roll of the County Board of Education for salary in amount less than the monthly rate of his contract and at a later date include the amount represented by the difference between the contract rate and the actual amount drawn, provided the transaction in full is consummated in the same fiscal year?"

"In other words, where the contract salary is \$250.00 per month, and \$225.00 per month is drawn for nine months of the year, does the county superintendent of education have authority to write his name on the September calendar payroll for the full contract amount of \$250.00 plus the \$225.00 past due or for any part of such past due amount of \$225.00?"

"Is a receipt for groceries signed by the husband of the teacher of vocational home economics in a public high school legal claim of the teacher for reimbursement of funds expended for vocational home economics maintenance? In the case in question, the husband is the teacher of vocational agriculture in the same school in which the wife teaches as vocational home economics teacher."

In answer to your first inquiry, I refer you to Section 169, School Code of Alabama, 1927, which provides in pertinent part as follows:

" \* \* \* The County Board of Revenue or Court of County Commissioners shall also provide necessary furniture, office equipment, stationery, postage, forms, and supplies required by the County Superintendent of Education and his assistants."

The word "stationery" has been very liberally construed by the courts. In **Underwood Typewriter Co. vs. Marengo County Bank**, 203 Ala. 123, 82 So. 158, it was held to include a typewriter. This office in an opinion to Hon. Charles W. Lee, State Comptroller, under date of August 18, 1938, held the word "stamps" to be broad enough to include necessary legitimate express charges. Therefore, under the foregoing trend of decisions, I am of the opinion "postage" is broad enough to include necessary telegrams. Thus, necessary telegrams are a legal charge against the Court of County Commissioners.

In answer to your second inquiry, I am of the opinion that a County Superintendent of Education is entitled to his full salary regardless of whether he has drawn it in equal monthly installments. "The acceptance of less compensation than that established by law for the office does not estop an officer from subsequently claiming the legal compensation." 46 C. J. 107, **Officers 275**. I also refer you to an opinion of this office under date of December 17, 1937, to Hon. Eugene Hawkins, Judge of Probate of Jefferson County, found in Book 1-A (Office Edition).

The answer to your third inquiry turns upon a question of fact. If the groceries in question were purchased in accordance with law and paid for by the teacher, said teacher is entitled to reimbursement regardless of who signed the receipt.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

December 23, 1938.

Hon. Eugene H. Hawkins,  
Judge of Probate,  
Jefferson County,  
Birmingham, Alabama.

Housing Authority created by General Acts 1935, page 126, as amended by General Acts 1935, page 947, not subject to deed tax where, as grantee, it offers deeds for record.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of December 19, 1938, in which you request my opinion as follows:

"Please refer to the General Acts of Alabama, 1935, page 126 and General Acts of Alabama, 1935, page 947, and Southern 179, page 535, and advise me if deeds made to the Housing Authority of the B'ham district are exempt from deed tax.

"Mr. John Gillon of the firm of Coleman, Spain, Stewart & Davies, attorneys for the Housing Authority has just advised me that in the immediate future, possibly tomorrow, that he will file a number of deeds made to the Housing Authority, and I would appreciate your giving special attention to this request."

In my opinion, no deed tax is required to be collected on deed made to the Housing Authority created by the Housing Authorities Law of 1935 (General Acts 1935, page 126, amended page 947).

In the case of **In Re Opinions of the Justices**, 179 So. 535, the Supreme Court of Alabama, in response to a question propounded by the Governor, held that the "Housing Authority" created by the 1935 Act was an administrative agency of a municipality and as such held that it was exempt from ad valorem taxes under the Constitution.

This office has heretofore held in an opinion to Hon. N. P. Tompkins, Judge of Probate, Colbert County, issued under date of July 9, 1936, that a deed to a municipality, where such deed is filed by the grantee, is not subject to taxation (Quarterly Report of the Attorney General, Volume 4, page 28). In the Tompkins opinion, we said:

"The general rule laid down in *Huntsville v. Madison County*, 166 Ala. 389, and *State v. City of Montgomery*, 151 So. 857, that a political subdivision of the State is not subject to taxation in the absence of a clear legislative intent to impose such tax, is here applicable. There is no clearly expressed legislative intent to impose the tax in question on a deed filed by a municipality and, consequently, the deed in question would not \* \* \* be subject to deed tax."

In the case of **In Re Opinions of the Justices**, supra, the Court describes the Housing Authority as follows:

"The Housing Authority is to be a corporation brought into existence upon the order of a city government, public in nature, and charged with the duty of performing an important element of the police power of the city under whose sanction it shall come into existence. \* \* \* "

Upon this predicate the Court concludes:

"The mere fact that it is a corporation does not deprive it of the qualities of a governmental agency, nor of the immunities of the government for which it operates."

"The Housing Authority is an administrative agency of a city, and its property is therefore for certain purposes that of a municipal corporation and is entitled to the tax exemption of section 91, Constitution."

In view of the fact that the city is performing a governmental function through the instrumentality of its administrative agency, the Housing Authority, created by or for the city's use in such connection, and in view of the further fact that there is no clearly expressed legislative intent to impose the deed tax on either a municipality or its lawfully created agency, I am of the opinion that the deeds in question would not be subject to deed tax.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

---

December 23, 1938.

Hon. Chas. W. Lee,  
State Comptroller,  
Capitol.

**Taxation—Exemptions—Refund.**

1. A subordinate Masonic Lodge is entitled to a refund for ad valorem taxes paid in 1936 and 1937, on the property owned by it under the authority of **Ware Lodge v Harper**, 182 So. 59.

2. The petition for refund submitted conforms to the provisions of Sections 296-302 (incl.) of Chapter VI, Article 8 of the 1935 Revenue Code.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:



We are attaching a petition filed by the Charles Baskerville Lodge No. 281, A. F. and A. M. of Fayette, Alabama, requesting a refund of ad valorem taxes.

"We will appreciate your advising us if this petition is in proper form and whether a refund can be granted."

I have examined the petition of Charles Baskerville Lodge, attached to your letter, seeking a refund of ad valorem taxes paid during 1936 and 1937 on property owned by the Lodge located in Fayette, Alabama. The petition seeks a refund on the authority of an opinion of the Supreme Court of Alabama. (*Ware Lodge v. Harper*, 182 So. 59). The petition is in proper form and complies with the provisions of Sections 292-302, of the 1935 Revenue Code, contained in Chapter XI of Article 8 thereof. Section 296 provides in part as follows:

**"Any taxpayer who through any mistake or by reason of any double assessment, or by any error \* \* \* has paid taxes that were not due upon the property of such taxpayers, shall, unless such tax was with knowledge of the facts voluntarily paid by the taxpayer, be entitled, upon making proof to the satisfaction of the State Comptroller of such payment, to have such taxes refunded to him if the application shall be made therefor, as hereinafter provided within two years from the date of such payment."** (Emphasis ours).

The Supreme Court of Alabama in the *Ware Lodge* case, (*supra*) held that under General Acts 1859-1860, p. 458, a vested right as to exemption from ad valorem taxes was granted to the Grand Lodge of Free and Accepted Masons of Alabama and to each subordinate lodge thereof; that a contract was created between the Masonic Order and the State; and that subsequent legislation which provided that only the property of the Masonic Order used for charitable purposes should be exempt from taxation did not affect the contract created by the 1859 Act. Therefore, the taxes paid by the Charles Baskerville Lodge, prior to the opinion of the Supreme Court (*Ware Lodge case v. Harper, supra*), were paid under a mistake of fact and it is my opinion the Charles Baskerville Lodge is entitled to a refund of the taxes paid for 1936 and 1937, as set forth in the petition and as certified to by the Probate Judge.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.

---

December 23, 1938.

Hon. Frank O. Deese,  
Judge of Probate,  
Dale County,  
Ozark, Alabama.

Compensation for county for conveying patients to hospital.—  
(1) There is no authority to permit the Judge of Probate and Commissioners to make a lump sum contract with the sheriff or an in-

dividual for conveying patients to hospital. Section 1445, Code of Alabama, 1923, must be strictly followed. (2) Section 1445 does not authorize a per diem payment.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your letter of February 22, 1935, in which you request my opinion as follows:

"Will you kindly advise me whether or not the Judge of Probate or the Judge of Probate and the Commissioners Court would have authority to make a lump sum contract with the Sheriff or some other person for conveying indigent patients to the Insane Hospital? We contemplate making such an agreement for an agreed sum for each patient, it being intended to make such sum slightly less than the expenses as computed on the basis of railroad fare and other traveling expenses.

"Kindly advise me whether Section 1445 of the Code of 1923 authorized the payment of a per diem for the person or persons deputized to convey a patient to the Hospital."

It is my conclusion that the Judge of Probate and the Commissioners Court cannot enter into a lump sum contract with the sheriff or any other person for conveyance of indigent patients to the Insane Hospital in view of Section 1445 of the Code of Alabama, 1923. Said Section 1445 is the only authority for such acts, and is as follows:

"Section 1445. CONVEYING PATIENT TO HOSPITAL.—The judge of probate shall depute one or more persons, relatives, friends, or officers, as he may see fit, to convey the patient to the hospital and all necessary expenses incurred in conveying an indigent patient to the hospital shall be paid out of the county treasury on order from the county commissioners."

This statute allows a fee, and must be strictly followed.

I refer you to Section 7255, Code of Alabama, 1923.

"Section 7255. NO FEE CHARGED UNLESS EXPRESSLY AUTHORIZED.—The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

"An officer demanding fees for services rendered must point to some clear and definite provision of the statute which authorizes the demand, and compensation cannot be allowed, unless it is conferred by a strict construction of the language employed in the statute. Statutes giving costs or fees will not be extended beyond their letter."—*Herrmann v. Mobile County*, 202 Ala. 274, 80 So. 112; *Troup v. Morgan County*, 109 Ala. 162, 19 So. 503.

It is my opinion that Section 1445 of the Code of Alabama, 1923, does not authorize a per diem for the person or persons deputized to convey a patient to the hospital.

"Generally, the term 'per diem', as used in connection with compensation, wages, or salary, means pay for a day's service." *Scroggie v. Scarborough*, 160 S. E. 596, 599; 3 Words and Phrases, (Fourth Series) p. 62.

Said Section 1445 merely states that all necessary expenses incurred shall be paid out of the county treasury, and to authorize payment for a day's service, would completely vitiate a strict compliance with the statute.

An opinion rendered to Hon. Frank O. Deese, Judge of Probate, Dale County, on March 11, 1935, is hereby modified to conform to the above.

Yours very truly,

A. A. CARMICHAEL,  
Attorney General.



## I N D E X

## OCTOBER - NOVEMBER - DECEMBER

1938

Page

"A"

## ACTS: (General and Local)

## GENERAL ACTS OF 1931:

|                |     |
|----------------|-----|
| Page 261 ..... | 91  |
| Page 402 ..... | 88  |
| Page 759 ..... | 5   |
| Page 806 ..... | 132 |

## GENERAL ACTS OF 1932:

|                |     |
|----------------|-----|
| Page 200 ..... | 102 |
| Page 298 ..... | 88  |

## GENERAL ACTS OF 1933:

|                |   |
|----------------|---|
| Page 201 ..... | 5 |
|----------------|---|

## GENERAL ACTS OF 1935:

|                |     |
|----------------|-----|
| Page 43 .....  | 60  |
| Page 70 .....  | 34  |
| Page 204 ..... | 49  |
| Page 594 ..... | 118 |

## GENERAL ACTS OF 1936:

|                |     |
|----------------|-----|
| Page 51 .....  | 58  |
| Page 105 ..... | 27  |
| Page 208 ..... | 126 |

## GENERAL ACTS 1936-37:

|                |     |
|----------------|-----|
| Page 88 .....  | 41  |
| Page 89 .....  | 41  |
| Page 125 ..... | 39  |
| Page 225 ..... | 103 |

## LOCAL ACTS OF 1933:

|               |    |
|---------------|----|
| Page 14 ..... | 61 |
| Page 43 ..... | 61 |

## LOCAL ACTS OF 1935:

|                |    |
|----------------|----|
| Page 131 ..... | 53 |
|----------------|----|

## LOCAL ACTS OF 1936:

|               |    |
|---------------|----|
| Page 53 ..... | 69 |
|---------------|----|

## LOCAL ACTS OF 1936-37:

|               |    |
|---------------|----|
| Page 22 ..... | 20 |
|---------------|----|

## ALABAMA INSANE HOSPITAL:

|                             |    |
|-----------------------------|----|
| PWA, cooperation with ..... | 18 |
|-----------------------------|----|

# INDEX—Continued

|                                                                                             | Page |
|---------------------------------------------------------------------------------------------|------|
| <b>ALABAMA POLYTECHNIC INSTITUTE:</b>                                                       |      |
| Adjourned meeting of trustees may be recessed.....                                          | 32   |
| Authority to transact business at adjourned meeting.....                                    | 32   |
| PWA, authority to cooperate with .....                                                      | 29   |
| Special meeting of trustees.....                                                            | 33   |
| <b>APPEALS:</b>                                                                             |      |
| Tax valuation, appealed from Board of Review to<br>Circuit Court, jurisdiction of.....      | 111  |
| <b>APPROPRIATION:</b>                                                                       |      |
| Air-Service, National Guard .....                                                           | 88   |
| <b>"B"</b>                                                                                  |      |
| <b>BANKRUPTCY:</b>                                                                          |      |
| Tax sale, authority to set aside.....                                                       | 22   |
| <b>BANKRUPTCY ACT:</b>                                                                      |      |
| Section 17 .....                                                                            | 22   |
| Section 64 (a) .....                                                                        | 22   |
| <b>BANKS AND BANKING:</b>                                                                   |      |
| FHA loans made by Building & Loan Association.....                                          | 73   |
| <b>BOARD OF DENTAL EXAMINERS:</b>                                                           |      |
| Temporary permit .....                                                                      | 25   |
| <b>BOARD OF REVENUE:</b>                                                                    |      |
| Chairman of, in Walker County, member Board of Review.....                                  | 53   |
| Walker County Chairman, member Board of Review.....                                         | 53   |
| <b>BOARD OF REVIEW:</b>                                                                     |      |
| Tax valuation, appealed to Circuit Court, jurisdiction of.....                              | 111  |
| <b>BONDS:</b>                                                                               |      |
| Bonding company paying extent of bond subrogated<br>to the right of state.....              | 10   |
| Right of Way, purchase of, from gasoline fund,<br>transfer of general obligation bonds..... | 123  |
| <b>BUDGET ACT:</b>                                                                          |      |
| Appropriation for air-service, national guard .....                                         | 88   |
| <b>BUILDING &amp; LOAN ASSOCIATION:</b>                                                     |      |
| FHA loans .....                                                                             | 73   |
| Member, what constitutes .....                                                              | 73   |
| <b>"C"</b>                                                                                  |      |
| <b>CHAIN STORE ACT:</b>                                                                     |      |
| Vending machine .....                                                                       | 16   |
| <b>CIGARETTES:</b>                                                                          |      |
| Vending machine, selling to minors.....                                                     | 16   |

**INDEX—Continued**

|                                                                                           | Page    |
|-------------------------------------------------------------------------------------------|---------|
| <b>CIRCUIT COURTS:</b>                                                                    |         |
| When appealed from Board of Review, tax valuation, jurisdiction of .....                  | 111     |
| <b>CLAIMS:</b>                                                                            |         |
| Liability of County Treasurer for payment of illegal claim .....                          | 5       |
| <b>CLERK OF THE CIRCUIT COURT:</b>                                                        |         |
| Costs and fees, summons and complaint, interrogatories .....                              | 68      |
| <b>CODE OF ALABAMA, 1923:</b>                                                             |         |
| Section 97 .....                                                                          | 95      |
| Section 117 .....                                                                         | 95      |
| Section 133 .....                                                                         | 103     |
| Section 151 .....                                                                         | 95      |
| Section 152 .....                                                                         | 95      |
| Section 159 .....                                                                         | 95      |
| Section 161 .....                                                                         | 95      |
| Section 169 .....                                                                         | 118     |
| Section 186 .....                                                                         | 79, 103 |
| Section 219 .....                                                                         | 95      |
| Section 327 .....                                                                         | 25      |
| Section 452 .....                                                                         | 118     |
| Section 1106 .....                                                                        | 91      |
| Section 1151 .....                                                                        | 91      |
| Section 1445 .....                                                                        | 137     |
| Section 2124 .....                                                                        | 81      |
| Section 2603 .....                                                                        | 10      |
| Section 3095 .....                                                                        | 23      |
| Section 3485 .....                                                                        | 58      |
| Section 3741 .....                                                                        | 119     |
| Section 3758 .....                                                                        | 119     |
| Section 4626 .....                                                                        | 102     |
| Section 4659 .....                                                                        | 102     |
| Section 5028 .....                                                                        | 103     |
| Section 5369 .....                                                                        | 16      |
| Section 6755 .....                                                                        | 5       |
| Section 6964-75 .....                                                                     | 37      |
| Section 7285 .....                                                                        | 26      |
| Section 7287 .....                                                                        | 91      |
| Section 7278 .....                                                                        | 68      |
| Section 9594 .....                                                                        | 129     |
| <b>CONECUH COUNTY:</b>                                                                    |         |
| Chairman, Board of Revenue, may sign contract for road machinery .....                    | 65      |
| <b>CONSTITUTION:</b>                                                                      |         |
| Section 96 .....                                                                          | 41      |
| <b>CONSTITUTIONALITY:</b>                                                                 |         |
| Revenue Act 1935, Section 23 (a); .....                                                   |         |
| Section 161 (b) .....                                                                     | 41      |
| <b>CONTRACTS:</b>                                                                         |         |
| Between county and county officer, void, reasonable compensation for work performed ..... | 103     |

## INDEX—Continued

|                                                                                                                              | Page |
|------------------------------------------------------------------------------------------------------------------------------|------|
| Highway, time for payment "after completion of contract" .....                                                               | 34   |
| Real estate company developing property according to plans of<br>prospective purchasers .....                                | 54   |
| To purchase road machinery on installment plan .....                                                                         | 65   |
| <b>CORPORATIONS:</b>                                                                                                         |      |
| Fees collected by Judge of Probate and Secretary of State .....                                                              | 37   |
| <b>COSTS AND FEES:</b>                                                                                                       |      |
| Assignment of unearned fees by county officer .....                                                                          | 10   |
| Clerk of the Circuit Court, summons and complaint,<br>interrogatories .....                                                  | 68   |
| Informant, intoxicating liquor, more than one defendant .....                                                                | 102  |
| Notary Public in office of Judge of Probate .....                                                                            | 94   |
| Reconstruction Finance Corporation exempt from payment of<br>library tax, civil case appeal .....                            | 116  |
| Sheriff, attendance on Circuit Court, also County Court .....                                                                | 119  |
| Sheriff, detention of venereal diseased patients .....                                                                       | 91   |
| Sheriff, issuing subpoena in probate court .....                                                                             | 26   |
| Spark's amendment, effect of .....                                                                                           | 41   |
| <b>COUNTIES:</b>                                                                                                             |      |
| Chairman, Court of County Commissioners, refusing to sign<br>valid contract for county may be compelled by court order ..... | 65   |
| City Directories, purchase of, under local act .....                                                                         | 69   |
| Contract to purchase road machinery on installment plan .....                                                                | 65   |
| Contract with tax collector void .....                                                                                       | 103  |
| County Superintendent of Education, payment of post office<br>box rent, telegrams, long distance telephone calls .....       | 36   |
| Liability of County Treasurer for payment of illegal claim .....                                                             | 5    |
| Purchase of office supplies for Russell County officers .....                                                                | 20   |
| Sheriff's office, authority of county to equip .....                                                                         | 69   |
| Solicitor, reimbursement for bona fide use of telephone .....                                                                | 79   |
| Telegram sent by County Board of Education, liability for .....                                                              | 133  |
| Uniform Accounting & Reporting Act .....                                                                                     | 60   |
| <b>COUNTY BOARD OF EDUCATION:</b>                                                                                            |      |
| Policy of county governed by concurrent action of<br>superintendent and a board .....                                        | 95   |
| <b>COUNTY SUPERINTENDENT OF EDUCATION:</b>                                                                                   |      |
| Policy of county governed by concurrent action of superintendent<br>and a board .....                                        | 95   |
| Payment of post office box rent, telegrams, long distance<br>telephone calls .....                                           | 36   |
| <b>COUNTY TREASURER:</b>                                                                                                     |      |
| Liability for payment of illegal claim .....                                                                                 | 5    |
| <b>COURTS OF COUNTY COMMISSIONERS:</b>                                                                                       |      |
| Cannot make lump sum contract for conveying insane person<br>to hospital .....                                               | 137  |
| County Superintendent of Education, payment of post office<br>box rent, telegrams, long distance telephone calls .....       | 36   |



**INDEX—Continued**

|                                                                                         | Page     |
|-----------------------------------------------------------------------------------------|----------|
| Liability of County Treasurer for payment of illegal claim .....                        | 5        |
| Uniform Accounting & Reporting Act .....                                                | 60       |
| <b>CRIMINAL LAW:</b>                                                                    |          |
| Carrying concealed weapon .....                                                         | 58       |
| <b>"D"</b>                                                                              |          |
| <b>DEED TAX:</b>                                                                        |          |
| Quit claim deed, given in lieu of original warranty deed .....                          | 56       |
| <b>DENTISTS:</b>                                                                        |          |
| See Board of Dental Examiners .....                                                     | 25       |
| Temporary permit issued by board .....                                                  | 25       |
| <b>"E"</b>                                                                              |          |
| <b>ESCAPES:</b>                                                                         |          |
| Interest on escaped taxes .....                                                         | 117      |
| <b>EXEMPTIONS:</b>                                                                      |          |
| Instrumentality of a state filing instrument, filing tax .....                          | 109, 135 |
| Masonic lodges—entitled to refund on ad valorem taxes paid .....                        | 136      |
| Taxes, Masonic Lodge used partly for commercial purposes .....                          | 71       |
| (See homesteads)                                                                        |          |
| <b>"F"</b>                                                                              |          |
| <b>FEDERAL HOUSING ADMINISTRATION:</b>                                                  |          |
| Building & Loan Associations, servicing loans .....                                     | 73       |
| <b>FEES:</b>                                                                            |          |
| County cannot make lump sum contract for conveying insane<br>person to hospital .....   | 137      |
| Judges of Probate—Chief Clerk, performing duties in<br>case of vacancy .....            | 129      |
| Register in Chancery confiscating gambling devices—<br>services of court reporter ..... | 132      |
| Tax Assessor, Jefferson County, assessing school and<br>district taxes .....            | 61       |
| <b>FILING TAX:</b>                                                                      |          |
| Bond for title .....                                                                    | 109      |
| County Board of Education filing instrument, exempt from tax .....                      | 109      |
| Housing authority not liable for .....                                                  | 135      |
| Quit claim deed, given in lieu of original warranty deed .....                          | 56       |
| <b>FUNDS:</b>                                                                           |          |
| National Guard, unexpended balance at end of year,<br>distribution of .....             | 27       |
| Transfer of lubricating oil funds from general to gasoline fund .....                   | 21       |

## INDEX—Continued

Page

## "G"

## GASOLINE FUND:

|                                                                       |     |
|-----------------------------------------------------------------------|-----|
| Contract to purchase road machinery on installment plan .....         | 65  |
| Right of Way, purchase of .....                                       | 123 |
| Transfer of lubricating oil funds from general to gasoline fund ..... | 21  |

## "H"

## HALE COUNTY:

|                                                                              |     |
|------------------------------------------------------------------------------|-----|
| Right of Way, transfer of general obligation bonds to<br>gasoline fund ..... | 123 |
|------------------------------------------------------------------------------|-----|

## HEALTH:

|                                               |    |
|-----------------------------------------------|----|
| Detention of venereal diseased patients ..... | 91 |
|-----------------------------------------------|----|

## HIGHWAY DEPARTMENT:

|                                                                       |    |
|-----------------------------------------------------------------------|----|
| Time of payment, contract to construct highway .....                  | 34 |
| Transfer of lubricating oil funds from general to gasoline fund ..... | 21 |

## HIGHWAYS:

|                                                                              |     |
|------------------------------------------------------------------------------|-----|
| Right of Way, transfer of general obligation bonds to<br>gasoline fund ..... | 123 |
|------------------------------------------------------------------------------|-----|

## HOMESTEADS:

|                                                                        |    |
|------------------------------------------------------------------------|----|
| Exemption must be claimed, forms prescribed by<br>Tax Commission ..... | 87 |
|------------------------------------------------------------------------|----|

## HOUSING AUTHORITY:

|                                 |     |
|---------------------------------|-----|
| Not liable for filing tax ..... | 135 |
|---------------------------------|-----|

## HOUSTON COUNTY:

|                                                               |    |
|---------------------------------------------------------------|----|
| Solicitor, reimbursement for bona fide use of telephone ..... | 79 |
|---------------------------------------------------------------|----|

## "I"

## INCOME TAX:

(See taxation)

## INSANE PERSONS:

(See Alabama Insane Hospital)

(See Partlow State School for Mental Deficients)

## INSANITY:

|                                                                                   |     |
|-----------------------------------------------------------------------------------|-----|
| County cannot make lump sum contract conveying insane<br>person to hospital ..... | 137 |
|-----------------------------------------------------------------------------------|-----|

## INTOXICATING LIQUOR:

|                                          |     |
|------------------------------------------|-----|
| Informers, more than one defendant ..... | 102 |
|------------------------------------------|-----|

## "J"

## JEFFERSON COUNTY:

|                                                              |    |
|--------------------------------------------------------------|----|
| Assessor, fees for assessing school and district taxes ..... | 61 |
| Liability for payment of illegal claim .....                 | 5  |

**INDEX—Continued**

|                                                                                                           | Page |
|-----------------------------------------------------------------------------------------------------------|------|
| <b>JUDGES OF PROBATE:</b>                                                                                 |      |
| Chief Clerk performing duties in case of vacancy—<br>entitled to fees .....                               | 129  |
| Corporations, fees collected by .....                                                                     | 37   |
| <br>"L"<br>                                                                                               |      |
| <b>LICENSE TAGS:</b>                                                                                      |      |
| Coupe equipped to carry hunting dogs .....                                                                | 48   |
| <b>LICENSES:</b>                                                                                          |      |
| Cafe, dance hall .....                                                                                    | 121  |
| Carrying concealed weapon .....                                                                           | 58   |
| Coupe equipped to carry hunting dogs .....                                                                | 48   |
| Industrial and personal loans .....                                                                       | 12   |
| Milk distributor .....                                                                                    | 49   |
| Real estate company developing property according to plans of<br>prospective purchasers .....             | 54   |
| Tourist's camp .....                                                                                      | 105  |
| Vending machine not a chain store .....                                                                   | 16   |
| <br>"M"<br>                                                                                               |      |
| <b>MASONIC LODGES:</b>                                                                                    |      |
| Entitled to refund whenever ad valorem taxes paid .....                                                   | 136  |
| <b>MILEAGE TAX:</b>                                                                                       |      |
| Reciprocal agreement .....                                                                                | 126  |
| <b>MILITARY CODE:</b>                                                                                     |      |
| Section 16 .....                                                                                          | 27   |
| <b>MILK CONTROL BOARD:</b>                                                                                |      |
| License of distributor .....                                                                              | 49   |
| <b>MOTOR CARRIER ACT OF 1931:</b>                                                                         |      |
| P. 303 .....                                                                                              | 8    |
| <b>MOTOR VEHICLES:</b>                                                                                    |      |
| Assessment of, for municipal taxes .....                                                                  | 81   |
| Certificate of public convenience and necessity, method of<br>granting by Public Service Commission ..... | 8    |
| Coupe equipped to carry hunting dogs .....                                                                | 48   |
| Reciprocal Agreements, mileage tax .....                                                                  | 126  |
| <b>MUNICIPAL CORPORATIONS:</b>                                                                            |      |
| Penalty on delinquents .....                                                                              | 23   |
| <b>MUNICIPALITIES:</b>                                                                                    |      |
| Assessment of motor vehicles for municipal taxes .....                                                    | 81   |
| Special school taxes, disposition of and distribution of .....                                            | 63   |

## INDEX—Continued

|                                                                                                                             | Page |
|-----------------------------------------------------------------------------------------------------------------------------|------|
| "N"                                                                                                                         |      |
| NATIONAL GUARD:                                                                                                             |      |
| Air-service, appropriation for .....                                                                                        | 88   |
| Unexpended balance at end of year, distribution of .....                                                                    | 27   |
| NOTARY PUBLIC:                                                                                                              |      |
| Fee, clerk in probate office .....                                                                                          | 94   |
| "O"                                                                                                                         |      |
| OFFICERS:                                                                                                                   |      |
| Assignment of unearned fees .....                                                                                           | 10   |
| Bonding company paying extent of bond subrogated to the<br>right of state .....                                             | 10   |
| Chairman Court of County Commissioners, refusing to sign<br>valid contract for county may be compelled by court order ..... | 65   |
| Commissions and fees, effect of Spark's amendment .....                                                                     | 41   |
| Contract between county and county officer void, reasonable<br>compensation for work performed .....                        | 103  |
| Entitled to full compensation regardless of monthly installments .....                                                      | 133  |
| "P"                                                                                                                         |      |
| PARTLOW STATE SCHOOL:                                                                                                       |      |
| Deficients—PWA cooperation with .....                                                                                       | 18   |
| PROBATE COURT:                                                                                                              |      |
| Fee of sheriff for issuing subpoena in .....                                                                                | 26   |
| PUBLIC SERVICE COMMISSION:                                                                                                  |      |
| Certificate of public convenience and necessity, method<br>of granting .....                                                | 8    |
| PUBLIC WELFARE:                                                                                                             |      |
| Retroactive payment, Comptroller General's rulings .....                                                                    | 107  |
| Retroactive payments to individuals .....                                                                                   | 107  |
| PUBLIC WORKS ADMINISTRATION:                                                                                                |      |
| Alabama Insane Hospital, authority to cooperate with .....                                                                  | 18   |
| Alabama Polytechnic Institute, authority to cooperate with .....                                                            | 29   |
| Partlow State School for Mental Deficients, authority<br>to cooperate with .....                                            | 18   |
| "R"                                                                                                                         |      |
| REAL ESTATE DEALERS:                                                                                                        |      |
| License, real estate company developing property according<br>to plans of prospective purchasers .....                      | 54   |
| RECONSTRUCTION FINANCE CORPORATION:                                                                                         |      |
| Trial tax exempt from payment of library tax, civil case appeal .....                                                       | 116  |

## INDEX—Continued

|                                                                                                                                            | Page    |
|--------------------------------------------------------------------------------------------------------------------------------------------|---------|
| <b>REFUNDS:</b>                                                                                                                            |         |
| Masonic lodges—entitled to refund on ad valorem taxes paid .....                                                                           | 136     |
| <b>REGISTER IN CHANCERY:</b>                                                                                                               |         |
| Fees—Confiscating gambling devices—services of court reporter .....                                                                        | 132     |
| <b>REVENUE LAWS, 1935:</b>                                                                                                                 |         |
| Section 22 .....                                                                                                                           | 41, 61  |
| Section 23 .....                                                                                                                           | 41      |
| Section 27 .....                                                                                                                           | 87      |
| Section 44 .....                                                                                                                           | 23      |
| Section 45 .....                                                                                                                           | 117     |
| Section 67 .....                                                                                                                           | 53      |
| Section 159 .....                                                                                                                          | 61      |
| Section 161 .....                                                                                                                          | 61      |
| Section 161 (a) .....                                                                                                                      | 41      |
| Section 166 .....                                                                                                                          | 117     |
| Section 192 .....                                                                                                                          | 82      |
| Section 201 .....                                                                                                                          | 23      |
| Section 380 .....                                                                                                                          | 82      |
| Section 407 .....                                                                                                                          | 41      |
| Section 345.10 .....                                                                                                                       | 93      |
| Section 350 .....                                                                                                                          | 12      |
| Section 348—Schedule 42 .....                                                                                                              | 54      |
| Schedule 46 .....                                                                                                                          | 56, 109 |
| Schedule 55 .....                                                                                                                          | 121     |
| Schedule 93.5 .....                                                                                                                        | 12      |
| Schedule 94 .....                                                                                                                          | 109     |
| Schedule 121 .....                                                                                                                         | 121     |
| Schedule 142 .....                                                                                                                         | 105     |
| Schedule 155 .....                                                                                                                         | 16      |
| Schedule 158.12 .....                                                                                                                      | 81      |
| Schedule 158.15 .....                                                                                                                      | 126     |
| <b>RIGHT OF WAY:</b>                                                                                                                       |         |
| Highway, transfer of general obligation bonds to gasoline fund .....                                                                       | 123     |
| <b>ROADS &amp; BRIDGES:</b>                                                                                                                |         |
| Supplies purchased for, Uniform Accounting & Reporting Act .....                                                                           | 60      |
| <b>RUSSELL COUNTY:</b>                                                                                                                     |         |
| Purchase of office supplies for county officers .....                                                                                      | 20      |
| “S”                                                                                                                                        |         |
| <b>SALES TAX:</b>                                                                                                                          |         |
| Shoemakers .....                                                                                                                           | 39      |
| <b>SCHOOLS:</b>                                                                                                                            |         |
| County Superintendent of Education, payment of post office<br>box rent, telegrams, long distance telephone calls .....                     | 36      |
| Dispute between County Superintendent of Education and<br>County Board of Education, settled by State Superintendent<br>of Education ..... | 95      |

## INDEX—Continued

|                                                                                                                                      | Page   |
|--------------------------------------------------------------------------------------------------------------------------------------|--------|
| Free school books, storage of .....                                                                                                  | 118    |
| Jefferson County, fees of tax assessor assessing school and district taxes .....                                                     | 61     |
| Officer entitled to full compensation regardless of monthly installment payments .....                                               | 133    |
| Policy of county governed by concurrent action of Superintendent and a board .....                                                   | 95     |
| Special school taxes of municipality, disposition of and distribution of .....                                                       | 63     |
| Telegrams of county board—paid by county .....                                                                                       | 133    |
| <br><b>SCHOOL CODE: 1927</b>                                                                                                         |        |
| Section 527 .....                                                                                                                    | 32, 33 |
| <br><b>SECRETARY OF STATE:</b>                                                                                                       |        |
| Corporations, fees collected by .....                                                                                                | 37     |
| <br><b>SHERIFFS:</b>                                                                                                                 |        |
| Compensation for conveying insane patient to hospital—lump sum contract invalid .....                                                | 137    |
| Fee, attendance on Circuit Court .....                                                                                               | 119    |
| Fee, attendance on County Court .....                                                                                                | 119    |
| Fees, detention of venereal diseased patients .....                                                                                  | 91     |
| Fee, issuing subpoena in probate court .....                                                                                         | 26     |
| Office, authority of county to equip .....                                                                                           | 69     |
| <br><b>SOLICITORS:</b>                                                                                                               |        |
| Reimbursement for bona fide use of telephone in county business .....                                                                | 79     |
| <br><b>STATE COMPTROLLER:</b>                                                                                                        |        |
| Military Department appropriation, unexpended balance, distribution of .....                                                         | 27     |
| Transfer of lubricating oil funds from general to gasoline fund .....                                                                | 21     |
| <br><b>STATE SUPERINTENDENT OF EDUCATION:</b>                                                                                        |        |
| Dispute between County Superintendent of Education and County Board of Education, settled by State Superintendent of Education ..... | 95     |
| Policy of county governed by concurrent action of, and a board .....                                                                 | 95     |
| <br><b>SUBPOENAS:</b>                                                                                                                |        |
| Fee of sheriff for issuing in probate court .....                                                                                    | 26     |
| <br>"T"                                                                                                                              |        |
| <br><b>TAX ASSESSOR:</b>                                                                                                             |        |
| Assessment of motor vehicles for municipal taxes .....                                                                               | 81     |
| Commissions and fees, effect of Spark's Amendment .....                                                                              | 41     |
| Jefferson County, assessing school and district taxes .....                                                                          | 61     |
| Municipal taxes collected by, penalty on delinquents .....                                                                           | 23     |
| Protest, taxes paid under, disposition of state, county and municipal taxes .....                                                    | 82     |

## INDEX—Continued

|                                                                                                     | Page |
|-----------------------------------------------------------------------------------------------------|------|
| <b>TAX COLLECTOR:</b>                                                                               |      |
| Commissions and fees, effect of Spark's amendment .....                                             | 41   |
| Contract with counties, void .....                                                                  | 103  |
| Interest on escaped taxes .....                                                                     | 117  |
| Municipal taxes collected by, penalty on delinquents .....                                          | 23   |
| Protest, taxes paid under, disposition of state, county and<br>municipal taxes .....                | 82   |
| <b>TAX COMMISSION:</b>                                                                              |      |
| Reciprocal Agreement, mileage tax .....                                                             | 126  |
| <b>TAX SALES:</b>                                                                                   |      |
| Authority to set aside .....                                                                        | 22   |
| <b>TAXATION:</b>                                                                                    |      |
| Assessment of motor vehicles for municipal taxes .....                                              | 81   |
| Income tax, attorneys' fees, from war risk .....                                                    | 93   |
| Interest on escaped taxes .....                                                                     | 117  |
| License for making industrial and personal loans .....                                              | 12   |
| Masonic lodges—entitled to refund on ad valorem taxes paid .....                                    | 136  |
| Municipal corporation, penalty of delinquents .....                                                 | 23   |
| Protest, taxes paid under, disposition of state, county and<br>municipal taxes .....                | 82   |
| Shoemakers, sales tax .....                                                                         | 41   |
| Tax Valuation, appealed from Board of Review to Circuit Court,<br>jurisdiction of .....             | 111  |
| Tax sale, authority to set aside .....                                                              | 22   |
| <b>TAXES:</b>                                                                                       |      |
| Masonic Lodge used partly for commercial purposes .....                                             | 71   |
| <b>TELEPHONES:</b>                                                                                  |      |
| Solicitor, reimbursement for bona fide use of .....                                                 | 79   |
| <b>TRIAL TAX:</b>                                                                                   |      |
| Reconstruction Finance Corporation exempt from payment of<br>library tax, civil case appeal .....   | 116  |
| <b>TRUCKS:</b>                                                                                      |      |
| Coupe equipped to carry hunting dogs .....                                                          | 48   |
| <b>TUSCALOOSA COUNTY:</b>                                                                           |      |
| Sheriff's office, authority of county to equip .....                                                | 69   |
| <b>"U"</b>                                                                                          |      |
| <b>UNITED STATES GOVERNMENT:</b>                                                                    |      |
| * Reconstruction Finance Corporation exempt from payment<br>of library tax, civil case appeal ..... | 116  |
| * Federal Housing Association, Building & Loan Association<br>making loans .....                    | 73   |

**INDEX—Continued**

|                                                                  | Page |
|------------------------------------------------------------------|------|
| <b>"V"</b>                                                       |      |
| <b>VENDING MACHINES:</b>                                         |      |
| Cigarettes, selling to minors .....                              | 16   |
| License, not a chain store .....                                 | 16   |
| <b>VETERANS:</b>                                                 |      |
| Attorney's fee for handling war-risk insurance, income tax ..... | 93   |
| <b>"W"</b>                                                       |      |
| <b>WALKER COUNTY:</b>                                            |      |
| Chairman, Board of Revenue, member Board of Review .....         | 53   |
| <b>WORDS &amp; PHRASES:</b>                                      |      |
| "Cafe" .....                                                     | 121  |
| "Dance Hall" .....                                               | 121  |





